

- Santa Clara County, Calif.
- Ventura County, Calif.
- Adams County, Colo.
- Arapahoe County, Colo.
- Denver County, Colo.
- Broward County, Fla.
- Duval County, Fla.
- Hillsborough County, Fla.
- Osceola County, Fla.
- Palm Beach County, Fla.
- Cook County, Ill.
- Chicago, Ill.
- Ford County, Kan.
- Concordia Parish, La.
- New Orleans, La.
- St. Landry Parish, La.
- Boston, Mass.
- Springfield, Mass.
- Hamtramck, Mich.
- Noxubee County, Miss.
- Rosebud County, Mont.
- Colfax County, Neb.
- Bergen County, N.J.
- Essex County, N.J.
- Hudson County, N.J.
- Middlesex County, N.J.
- Salem County, N.J.
- Cibola County, N.M.
- Sandoval County, N.M.
- Kings County, N.Y.
- Queens County, N.Y.
- Richmond County, N.Y.
- Westchester County, N.Y.
- Cuyahoga County, Ohio
- Berks County, Pa.
- Bennett County, S.D.
- Buffalo County, S.D.
- Charles Mix County, S.D.
- Dewey County, S.D.
- Mellette County, S.D.
- Shannon County, S.D.
- Todd County, S.D.
- Ziebach County, S.D.
- Brazos County, Texas
- Ector County, Texas
- Fort Bend County, Texas
- Galveston County, Texas
- Hale County, Texas
- Medina County, Texas
- Travis County, Texas
- Williamson County, Texas
- Wilson County, Texas

- King County, Wash.
- Pierce County, Wash.

The observers and monitors will watch and record activities during voting hours at select polling locations in the aforementioned cities and counties. Civil Rights Division personnel will coordinate the federal activities and maintain contact with local election officials. In addition, the Department has deployed observers and monitors who speak Spanish, as well as Arabic, and a variety of Asian and Native American languages.

The OPM observers and Department personnel will monitor whether certain counties and localities are complying with federal voting laws by, for example, determining whether any voters are challenged improperly on the basis of their race, color, or membership in a language minority group; complying with the language minority provisions of the Voting Rights Act; permitting voters who are blind, have disabilities, or unable to read or write assistance by a person of their choice; and permitting all eligible voters to cast a ballot, or at least a provisional ballot.

Voters will be able to file complaints online on the Voting Section home page at <http://www.usdoj.gov/crt/voting/index.htm>. Civil Rights Division personnel will be available at a specially staffed toll free number, 1-800-253-3931, to receive complaints, and on a dedicated TTY line for the hearing impaired, 1-888-305-3228.

More information about the Voting Rights Act and other federal voting laws is available on the Department of Justice's Web site at <http://www.usdoj.gov/crt/voting>.

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Department of Justice

FOR IMMEDIATE RELEASE
MONDAY, NOVEMBER 7, 2005
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(202) 514-2007
TDD (202) 514-1888

FACT SHEET: PROTECTING VOTING RIGHTS AND PREVENTING ELECTION FRAUD

"Just one instance of fraud or one citizen who cannot exercise the power to vote is too many. Our work continues until every qualified citizen in every community in America has an equal chance to vote - and to have that vote count." - Attorney General Alberto R. Gonzales, October 4, 2005

For over 30 years, the Justice Department has had an Election Day program to ensure the right of eligible voters to cast their votes and help shape the nation's political leadership.

The Department of Justice has responsibility for enforcing federal civil rights laws guaranteeing voting rights and for prosecuting voter fraud. The Civil Rights and Criminal Divisions of the Department of Justice are involved in election matters to ensure both ballot access and ballot integrity.

The Criminal Division and the Department's 93 U.S. Attorneys are responsible for enforcing the election fraud laws passed by Congress and signed by the President.

The Civil Rights Division is charged with enforcing the Voting Rights Act of 1965 as well as the National Voter Registration Act, both of which are designed to guarantee access to the polls on Election Day.

In October 2002, the Department established a new law enforcement initiative, called the Ballot Access and Voting Integrity Initiative, to provide increased protections against election fraud and voting rights abuses. The Initiative mandated increased Department-wide efforts to enforce federal civil rights laws guaranteeing voting rights as well as to deter, and if necessary, investigate and prosecute voter fraud.

The Justice Department will have its Election Day program in place for the November 8, 2005 elections.

Election Day Program

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"Election crimes strike at the core of our representative system of government. Vigorous investigation and prosecution of those who commit election crimes thus serves two important goals: first, to punish those responsible for these crimes and to dismantle their corrupt machines, and, second, to assure the public that the integrity of the election process is one of the Department's highest priorities." - Assistant Attorney General of the Criminal Division Alice S. Fisher

"Protecting access to the ballot for all eligible voters on Election Day is a major priority of the Civil Rights Division. We are committed to safeguarding the voting rights of all Americans." - Acting Assistant Attorney General for Civil Rights Bradley J. Schlozman

On November 8, 2005, the Department of Justice will have in place its nationwide program to guarantee access to the polls, protect individual voting rights, and deter voter fraud and voter intimidation. In those districts where voting activity will take place, federal prosecutors, investigators, and Civil Rights Division attorneys will be readily available to the public for the purpose of receiving complaints and taking any appropriate action when the polls are open on Election Day. When the polls open, the resources of the Department of Justice - both in Washington, D.C. and in the states - will be available to handle complaints, ensure access, and open investigations.

Criminal Division:

The Criminal Division's Public Integrity Section has assigned attorneys to assist with potential voter fraud cases, as needed.

Lawyers with the Public Integrity Section will be on duty from the time the polls open on the East Coast until the time they close on the West Coast to provide consultation and coordination with the Department's District Election Officers.

Since the 2002 commencement of the Ballot Access and Voting Integrity Initiative, the Criminal Division and the U.S. Attorneys' Offices have opened nearly 200 criminal investigations of alleged election fraud or voter intimidation. Over 120 of these investigations are currently pending. In addition, since the Initiative began, over 95 persons have been charged with election fraud offenses, and over 55 of these defendants have been convicted.

The Justice Department will enforce the laws that prohibit:

voter intimidation; voting by ineligible individuals; bribery of voters; destruction of valid ballots or registrations; altering vote tallies; multiple voting; absentee ballot fraud; malfeasance by election officials; and ballot- box tampering or destruction.

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The Division has been engaged in a major outreach effort to minority groups and election officials to inform jurisdictions of their obligations under the Language Minority Provision of the Voting Rights Act. The Division will enforce the law that requires jurisdictions meeting certain criteria to provide bilingual access to elections.

The Division will enforce existing consent decrees.

Election Day Contact Information:

Voting Section [COMPLAINTS RELATED TO BALLOT ACCESS] Civil Rights Division
950 Pennsylvania Avenue, NW Washington, D.C. 20530 800-253-3931

Public Integrity Section [COMPLAINTS RELATED TO BALLOT INTEGRITY] Criminal
Division 950 Pennsylvania Avenue, NW Washington, D.C. 20530 202-514-1412

Office of Public Affairs [ALL MEDIA INQUIRIES] 950 Pennsylvania Avenue, NW
Washington, DC 20530 202-514-2007

Background Information on the Justice Department's Mission to Protect Voting Rights
and Prevent Election Fraud

The Ballot Access and Voting Integrity Initiative. In October 2002, then-Attorney General John Ashcroft ordered the creation of a Department-wide Ballot Access and Voting Integrity Initiative. The goals of this ongoing Initiative are to:

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Civil Rights and Criminal Division Leaders Heading Initiative. To protect the vote of Americans, resources from across the Department of Justice have been committed to this effort. Acting Assistant Attorney General of the Civil Rights Division Bradley Schlozman and Assistant Attorney General of the Criminal Division Alice S. Fisher are leading this initiative.

Annual Voting Integrity Seminars. Each year since the start of the Initiative the Justice Department holds a training seminar in Washington, D.C., for District Election Officers of all 93 U.S. Attorneys' Offices. These annual two-day seminars provide comprehensive training to federal prosecutors on the handling of election fraud and voting rights violations. This year's conference was held on October 4-5.

Designating Federal Prosecutors to Address Voting Matters. The Attorney General directed all 93 U.S. Attorneys to designate a District Election Officer responsible for our efforts on Election Day. These officers are experienced Assistant U.S. Attorneys with knowledge of the laws that address election fraud, as well as laws that:

prohibit racial discrimination and voter intimidation;

govern absentee voting for uniformed and overseas citizens, the elderly, and citizens with disabilities; and

protect the voting rights of minority language Americans.

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District Election Officers. These officers are election experts in their districts, and implement the Department of Justice's response to election fraud and campaign financing crimes under the overall supervision of the Public Integrity Section pursuant to 9 U.S.A.M. 85.210.

State Coordination. Pursuant to the Initiative, District Election Officers meet before significant elections with state and local election and law enforcement officials to coordinate the handling of election matters and offer federal assistance in the investigation and prosecution of election-related crimes that may occur in their respective districts.

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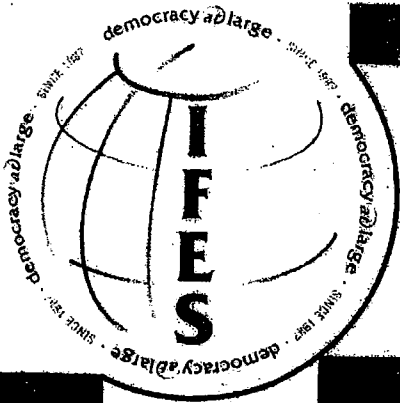
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IFES POLITICAL FINANCE WHITE PAPER SERIES

PROSECUTION OF ELECTORAL FRAUD UNDER UNITED STATES FEDERAL LAW

CRAIG C. DONSANTO

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PROSECUTION OF ELECTORAL FRAUD UNDER UNITED STATES FEDERAL LAW

— Prepared by
Craig C. Donsanto¹

A. INTRODUCTION

This paper will explore the prosecution of election fraud in the United States Federal Judicial System. It was prepared to accompany remarks by the author at a series of seminars on electoral corruption and vote buying that took place in Abuja, Nigeria on January ____, 2006 through January ____, 2006.

The subjects covered in this paper include defining what sort of conduct is currently considered to be criminally actionable in the United States, the historical background for the role of the criminal prosecutor in this area of public corruption offense, and the various federal laws and judicial precedents that govern the prosecution of this type of crime in the United States.

In the United States, electoral administration is primarily a State rather than a federal responsibility. The federal government has authority over electoral matters only where:

- Federal candidates are standing for election in the election where a corrupt act occurs, or
- A federal instrumentality such as the United States Mails or interstate telecommunications facilities are employed to facilitate the fraud, or
- The fraud involves the necessary participation of election or other public officials "acting under color of law" in a manner that implicates the right to Due Process and Equal Protection guaranteed by the 124th Amendment to the United States Constitution, or
- The fraud is motivated by an intent to deprive to vote to classes of voters whose voting rights have been specifically and expressly secured by the United States Constitution, e.g. African-Americans, women, young people who have attained the age of 18, and certain language minorities.

Despite these significant limitations, the task of prosecuting crimes against electoral processes has historically fallen principally to the federal government. Thus, issues of "federalism" (i.e., in this paper the relation of federal to State authority over electoral matters) play a significant role in the overall criminal enforcement of election crimes. Although Nigeria is, like the United States, a federal republic, the extent to which the same

¹Director, Election Crimes Branch, United States Department of Justice.

The views expressed in this paper are solely those of its author. They do not necessarily reflect those of the United States Department of Justice on the issues addressed. This paper creates no procedural or substantive rights for private parties, and cannot be relied upon by those whose circumstance may fall within the discussion herein.

federalism issues exist in there is not known to the author of this paper at the time it was prepared. But since these issues play such an important role in the prosecution of election crimes in the United States, they will be addressed, where appropriate, in this paper.

Finally, the United States follows a common law tradition in its jurisprudence. This means that the application of statutory laws to specific factual situations is interpreted by the Courts, and that these judicial decisions have precedential effect on future situations where the same statutes and laws are involved. The texts of the federal criminal laws dealing with electoral fraud that are discussed in this paper are presented in an Appendix. However, in the common law jurisprudential system that prevails in the United States, the meaning of a particular statutory text, and its application to a given set of facts, is governed not just by the statutes words but also how those words have been interpreted by the courts. For this reason, the discussion that follows contains annotations to the pertinent judicial and case authorities that give the statutes discussed the meanings the author has attributed to them in the text.

B. HISTORICAL BACKGROUND

Federal concern over the integrity of the franchise in the United States has historically had two distinct points of focus. One -- to secure the general public elections that are not corrupted -- is the subject of this chapter. The other -- to ensure there is no discrimination against minorities at the ballot box -- involves entirely different constitutional and federal interests, and is supervised by the Justice Department's Civil Rights Division.

Federal interest in the integrity of the franchise was first manifested immediately after the Civil War. Between 1868 and 1870, Congress passed the Enforcement Acts, which served as the basis for federal activism in prosecuting corruption of the franchise until most of them were repealed in the 1890s. See *In re Coy*, 127 U.S. 731 (1888); *Ex parte Yarborough*, 110 U.S. 651 (1884); *Ex parte Siebold*, 100 U.S. 371 (1880).

Many of the Enforcement Acts had broad jurisdictional predicates which allowed them to be applied to a wide variety of corrupt election practices as long as a federal candidate was on the ballot. In *Coy*, the Supreme Court held that Congress had authority under the Constitution's Necessary and Proper Clause to regulate any activity during a mixed federal/state election which exposed the federal election to potential harm, whether that harm materialized or not. *Coy* is still good law. *United States v. Carmichael*, 685 F.2d 903, 908 (4th Cir. 1982), cert. denied, 459 U.S. 1202 (1983); *United States v. Mason*, 673 F.2d 737, 739 (4th Cir. 1982); *United States v. Malmay*, 671 F.2d 869, 874-75 (5th Cir. 1982); *United States v. Bowman*, 636 F.2d 1003, 1001 (5th Cir. 1981); *United States v. Cole*, 41 F.3d 303 (7th Cir. 1994); *United States v. McCrainie*, 169 F.3d 763 (11th Cir. 1999).

After Reconstruction, federal activism in election matters retrenched. The repeal of most of the Enforcement Acts eliminated the statutory tools that had encouraged federal activism in election fraud matters. Two surviving provisions of these Acts, now embodied in 18 U.S.C. " 241 and 242, covered only intentional deprivations of rights guaranteed directly by the Constitution or federal law. The courts during this period held that the Constitution directly conferred a right to vote only for federal officers, and that conduct aimed at corrupting nonfederal contests was not prosecutable in federal courts. See *United States v. Gradwell*, 243 U.S. 476 (1917); *Guinn v. United States*, 238 U.S. 347 (1915). Federal attention to election fraud was further limited by case law holding that primary elections were not part of the official election process, *United States v. Newberry*, 256 U.S. 232 (1918), and by cases like *United States v. Bathgate*, 246 U.S. 220 (1918), which read the entire subject of vote buying out of federal criminal law, even when it was directed at federal contests.

In 1941, the Supreme Court reversed direction, overturning *Newberry*. The Court recognized that primary elections are an integral part of the process by which candidates are elected to office. *United States v. Classic*, 313 U.S. 299 (1941). *Classic* changed the judicial attitude toward federal intervention in election matters, and ushered in a new period of federal activism. Federal courts now regard the right to vote in a fairly conducted

election as a constitutionally protected feature of United States citizenship. *Reynolds v. Sims*, 377 U.S. 533 (1964).

In 1973, the use of section 241 to address election fraud began to expand. *United States v. Anderson*, 481 F.2d 685 (4th Cir. 1973), *aff'd* on other grounds, 417 U.S. 211 (1974). Since then, this statute has been successfully applied to prosecute certain types of local election fraud. *United States v. Howard*, 774 F.2d 838 (7th Cir. 1985); *United States v. Olinger*, 759 F.2d 1293 (7th Cir.), *cert. denied*, 474 U.S. 839 (1985); *United States v. Stollings*, 501 F.2d 954 (4th Cir. 1974); *United States v. Wadena*, 152 F.3d 851 (8th Cir. 1998).²

The federal mail fraud statute, 18 U.S.C. ' 1341,³ was used successfully for decades to enable federal prosecutors to reach frauds that took place in purely local elections, under the theory that such schemes defrauded citizens of their right to fair and honest elections. *United States v. Clapps*, 732 F.2d 1148 (3d Cir.), *cert. denied*, 469 U.S. 1085 (1984); *United States v. States*, 488 F.2d 761 (8th Cir. 1973), *cert. denied*, 417 U.S. 909 (1974). However, use of this mail fraud theory to address election fraud has been barred since 1987, when the Supreme Court held that the statute did not apply to schemes to defraud someone of intangible rights (such as the right to honest elections). *McNally v. United States*, 483 U.S. 350 (1987). Congress responded to McNally the following year by enacting a provision which specifically defined section 1341 to include schemes to defraud someone of "honest services." 18 U.S.C. ' 1346. However, unfortunately, section 1346 did not restore use of section 1341 for most election crimes, since they do not involve the element of "honest services."

Finally, over the past forty years Congress has enacted new criminal laws with broad jurisdictional bases to combat false registrations, vote buying, multiple voting, and fraudulent voting in elections where a federal candidate is on the ballot. 42 U.S.C. " 1973i(c), 1973i(e), 1973 gg-10. These statutes rest on Congress's power to regulate federal elections (art. I, § 4) and on its power under the Necessary and Proper Clause (art. I, § 8, cl. 18) to enact laws to protect the federal election process from the potential of corrupt abuse. The federal jurisdictional predicate underlying these statutes is satisfied as long as either the name of a federal candidate is on the ballot or the fraud involves corruption of the voter registration process in a state where one registers to vote simultaneously for federal as well other offices. *Bowman, Malmay, Mason, supra*; *United States v. Garcia*, 719 F.2d 99 (5th Cir. 1983); *United States v. 411 F3d 643* (6th Cir. 2005); *United States v. Olinger*, 759 F.2d 1293 (7th Cir.), *cert. denied*, 474 U.S. 839 (1985); *United States v. Howard*, 774 F.2d 838 (7th Cir. 1985); *United States v. McCrainie*, 169 F.3d 723 (11th Cir. 1999); *United States v. Barker*, 514 F.2d 1077 (7th Cir. 1975); *United States v. Ciancuilli*, 482 F.Supp. 585 (E.D. PA. 1979).

²As indicated in the cited cases, section 241 has been used to prosecute election fraud that affects the vote for federal officials, as well as vote fraud directed at non-federal candidates that involves the corruption of public officials — most often election officers — acting under color of law: *i.e.*, ballot-box stuffing schemes. This latter type of scheme will be referred to in this book as a "public scheme." A scheme that does not involve the necessary participation of corrupt officials acting under color of law but which affects the tabulation of votes for federal candidates will be referred to as a "private scheme."

³The Mail Fraud statute was enacted originally in 1872. It prohibits using the United States Mail, which in the United States is a federal instrumentality over which the federal Congress has legislative jurisdiction, to further "schemes to defraud." Its original purpose was to prevent the mails from being used to further schemes to defraud victims of money. However, over the ensuing decades, federal courts in the United States interpreted the words "scheme to defraud" as used in this statute to encompass many additional varieties of dishonest behavior, including most activities aimed at corrupting elections.

C. WHAT IS ELECTION FRAUD? (Defining the Term)

1. In General

Election fraud involves a substantive irregularity relating to the voting act -- such as bribery, intimidation, or forgery -- which has the potential to taint the election itself. During the past century and a half, Congress and the federal courts have articulated the following constitutional principles concerning the right to vote in the United States. Any activity intended to interfere corruptly with any of these principles may be actionable as a federal crime:

- All qualified citizens are eligible to vote.
- All qualified voters have the right to have their votes counted fairly and honestly.
- Invalid ballots dilute the worth of valid ballots and therefore will not be counted.
- Every qualified voter has the right to make a personal and independent election decision.
- Qualified voters may opt not to participate in an election.
- Voting shall not be influenced by bribery or intimidation.

Simply put, then, election fraud⁴ is conduct intended to corrupt:

- (a) the process by which elections are conducted and ballots are obtained, marked, or tabulated;
- (b) the process by which election results are canvassed and certified; or
- (c) the process by which voters are registered.

On the other hand, schemes that involve corruption of other political processes (i.e., political campaigning, circulation of nominating petitions, awarding public works projects to otherwise deserving objects on the eve of elections, transporting voters to the polls, etc.) do not normally serve as the basis for a federal election crime.

2. Conduct that constitutes federal election fraud⁵

The following activities provide a basis for federal prosecution under the statutes referenced in each category:

Paying voters to register to vote, or to participate in elections, where a federal candidate is on the ballot (42 U.S.C. § 1973i(c), 18 U.S.C. § 597), or through the use of the mails in those states where vote buying is a "bribery" offense (18 U.S.C. § 1952), as well as in federal elections⁶ in those States where purchased

⁴ Whether any of these types of election fraud is actionable under federal criminal law is discussed below.

⁵ As used throughout this book, the terms "federal election fraud" and "election fraud" mean fraud relating to an election that can be reached under a federal criminal statute. As will be discussed below, this term is not necessarily limited to frauds aimed at federal elections.

⁶ For purposes of this book, the term "federal election" means an election where the name of a federal candidate is on the ballot, regardless of whether there is proof that the fraud caused a vote to be cast for the federal candidate. A

registrations or votes are void under applicable state election law (42 U.S.C. § 1973gg-10). In the United States, the crime of vote buying is confined to situations where something of pecuniary value is offered or given to an individual for the purpose of stimulating or rewarding participation in elections. It does not cover the theft or use of government resources to advance electoral ends, although such conduct can be prosecuted under other prosecutive theories dealing with theft, embezzlement or fraud.

- Preventing voters from participating in elections where a federal candidate is on the ballot, or when done "under color of law" in any election, federal or nonfederal (18 U.S.C. §§ 241, 242).
- Voting for individuals in federal elections who do not personally participate in, and assent to, the voting act attributed to them, or impersonating voters or casting ballots in the names of voters who do not vote in federal elections (42 U.S.C. §§ 1973i(c), 1973i(e), 1973gg-10).
- Intimidating voters through physical duress in any type of election (18 U.S.C. § 245(b)(1)(A)), or through physical or economic threats in connection with their registering to vote or their voting in federal elections (42 U.S.C. § 1973gg-10), or to vote for a federal candidate (18 U.S.C. § 594). If the victim is a federal employee, intimidation in connection with any election, federal or non-federal, is covered (18 U.S.C. § 610).
- Malfeasance by election officials acting "under color of law" to do such things as dilute valid ballots with invalid ones (ballot-box stuffing), render false tabulations of votes, or prevent valid voter registrations or votes from being given effect in any election, federal or nonfederal (18 U.S.C. §§ 241, 242), as well as in elections where federal candidates are on the ballot (42 U.S.C. § 1973i(c), 1973i(e), 1973gg-10).

"non-federal election is one where no federal candidate was on the ballot.

- Submitting fictitious names on voter registration rolls and thereby qualifying the ostensible voters to vote in any election, nonfederal or federal (42 U.S.C. §§ 1973i(c), 1973gg-10).⁷
- Knowingly procuring eligibility to vote for federal office by persons who are not entitled to the vote under applicable state law, notably persons who have committed serious crimes (approximately 40 states)(42 U.S.C. §§ 1973i(c), 1973gg-10), and persons who are not United States citizens (currently all states)(42 U.S.C. §§ 1973i(c), 1973gg-10; 18 U.S.C. §§ 1015(f) and 611).
- Knowingly making a false claim of United States citizenship to register to vote or to vote in any election (18 U.S.C. § 1015(f)), or falsely and willfully claiming US citizenship for, inter alia registering or voting in any election (18 U.S.C. § 911).
- Providing false information concerning a person's name, address, or period of residence in a voting district in order to establish that person's eligibility to register or to vote in a federal election (42 U.S.C. §§ 1973i(c), 1973gg-10).
- Causing the production of voter registrations that qualify alleged voters to vote for federal candidates, or the production of ballots in federal elections, that the actor knows are materially defective under applicable state law (42 U.S.C. § 1973gg-10).

⁷ The criminal statutes addressing registration fraud are confined to those committed in registering to vote for federal candidates. However, election registration is "unitary" in all 50 States in the sense that a person registers only once to become eligible to cast ballots for both federal and non-federal candidates. Therefore false information given to establish eligibility to register to vote is actionable federally regardless of the type of election that motivated the subjects to act. See, e.g., United States v. Ciancuilli, 482 F. Supp. 585 (E.D. Pa. 1979).

- Using the United States mails, or interstate wire facilities, to obtain the salary and emoluments of an elected official through any of the activities mentioned above (18 U.S.C. §§ 1341, 1343). At the time this article was written, this so-called "salary theory" of mail and wire fraud had not yet received wide judicial support. However, where it has been accepted, it does permit federal prosecutive jurisdiction to be asserted over an election fraud scheme based on the use of a federal instrumentality to carry it out, and regardless of the type of election involved: federal or nonfederal.⁸
- Ordering, keeping, or having under one's authority or control any troops or armed men at any polling place in any election, federal or nonfederal. The actor must be an active civilian or military officer or employee of the United States government (18 U.S.C. § 592).

3. Conduct that does not constitute federal election fraud

Various types of conduct that might adversely affect the election of a federal candidate may not constitute federal election crimes, despite what in many instances may be their reprehensible character. For example, a federal election crime does not normally involve irregularities relating the accuracy of campaign literature, campaigning too close to the polls, the process by which a candidate obtains the withdrawal of an opponent, transporting voters to the polls, and the negligent failure of election officers to comply with state-mandated voting procedures.

Also, "facilitation payments," that is things of value given to voters to make it easier for the voter to cast a ballot but which are not intended to stimulate or reward the voting act itself (e.g., a ride to the polls, a stamp to mail in an absentee ballot) do not ordinarily involve a federal crime. Examples who have already made up their minds to vote Federal election crime.

Finally, it is not a federal crime in the United States to time the award of otherwise justified public works projects of other similar government programs close to elections, or to target such government grants to areas where the political competition is considered to be "close." The crime of "vote buying" in the United States is confined to giving something of pecuniary value, or offering to give something of pecuniary value, to individual voters in order to stimulate recipient to, or reward the recipient for, participating in voting activity. However, where the sole reason for a public grant award can be proven to have been to advance the electoral prospects of the incumbent political party, ad for example where there is no valid [public justification for a grant award other than achieving partisan political advantage, federal offenses can arise.

4. Conditions conducive to election fraud

Most election fraud is aimed at corrupting elections for local offices, which control or influence patronage positions. Election fraud schemes are thus often linked to such other crimes as protection of illegal activities, corruption of local governmental processes, and patronage abuses.

Election fraud does not normally occur in jurisdictions where one political faction enjoys widespread support among the electorate, because in such a situation it is usually unnecessary or impractical to resort to election fraud

⁸ The "McNally-fix" statute, 18 U.S.C. § 1346, did not restore use of the mail and wire statutes for election fraud schemes because its "intangible rights" concept is confined to schemes that involve a "deprivation of honest services," a motive not usually found in election fraud schemes. Thus, the utility of these statutes to address election fraud generally is confined to schemes where the proof shows that the defendant intended, as an objective of the scheme, to obtain for the "favored" candidate the salary and emoluments of an elected position. See generally, *United States v. Webb*, 689 F. Supp. 703 (W.D. Ky. 1988); *Ingber v. Enzor*, 664 F. Supp. 814 (S.D.N.Y.), *aff'd*, 841 F.2d 450 (2d Cir. 1988).

in order to control local public offices. Instead, election fraud occurs most frequently where there are fairly equal political factions, and where the stakes involved in who controls public offices are weighty -- as is often the case where patronage jobs are a major source of employment, or where illicit activities are being protected from law enforcement scrutiny. In sum, election fraud is most likely to occur in electoral jurisdictions where there is close factional competition for an elected position that matters.

5. Voter participation versus non-voter participation cases

As a practical matter, election frauds fall into two basic categories: those in which individual voters do not participate in the fraud, and those in which they do. The investigative approach and prosecutive potential are different for each type of case.

a) Election frauds not involving the participation of voters

The first category involves cases where voters do not participate, in any way, in the voting act attributed to them. These cases include ballot box stuffing, ghost voting, and "nursing home" frauds.⁹ All such matters are potential federal crimes. Proof of these crimes depends largely on evidence generated by the voting process, or on handwriting exemplars taken from persons who had access to voting equipment and thus the opportunity to misuse it. Some of the more common ways these crimes are committed include:

- Placing fictitious names on the voter rolls. This "deadwood" allows for fraudulent ballots, which can be used to stuff the ballot box.
- Casting bogus votes in the names of persons who did not vote.
- Obtaining and marking absentee ballots without the active input of the voters involved. Absentee ballots are particularly susceptible to fraudulent abuse because, by definition, they are marked and cast outside the presence of election officials.
- Falsifying vote tallies.

b) Election frauds involving the participation of voters

The second category of election frauds includes cases in which the voters do participate, at least to some extent, in the voting acts attributed to them. Common examples include:

- Vote buying schemes.

⁹ An example of a nursing home fraud is *United States v. Odom*, 736 F.2d 104 (4th Cir. 1984), which involved a scheme by local law enforcement officials and others to vote the absentee ballots of mentally incompetent residents of a nursing home.

- Absentee ballot frauds.
- Voter intimidation schemes.
- Migratory-voting (or floating-voter) schemes.
- Voter "assistance" frauds, in which the wishes of the voters are ignored or not sought by an offender who purports to be "helping" the voter vote.

Successful prosecution of these cases usually requires the cooperation and testimony of the voters whose ballots were corrupted. This requirement presents several difficulties. An initial problem is that the voters themselves may be technically guilty of participating in the scheme. However, because these voters can often be considered victims, the Justice Department has adopted a practice of declining to prosecute them.

The second difficulty encountered in cases where voters participate is a more significant hurdle. Any participation by the voter, no matter how slight, may preclude prosecution or make its success less likely. The voter's presence alone may suggest that he or she "consented" to the defendant's conduct (marking the ballot, taking the ballot, choosing the candidates, etc.). Compare *United States v. Salisbury*, 983 F.2d 1369 (6th Cir. 1993) (leaving unanswered the question whether a voter who signs a ballot envelope at the defendant's instruction but is not allowed to choose the candidates has consented to having the defendant mark his or her ballot), with *United States v. Cole*, 41 F.3d 303 (7th Cir. 1994) (finding that voters who merely signed ballots subsequently marked by the defendant were not expressing their own electoral preferences).

While the presence of the ostensible voter when another marks his or her ballot does not negate whatever crime might be occurring, it may increase the difficulty of proving the crime. This difficulty is compounded by the fact that those who commit this type of crime generally target vulnerable members of society, such as persons who are uneducated, socially disadvantaged, or with little means of livelihood -- precisely the type of person who is likely to be subject to manipulation or intimidation. Therefore, in cases where the voter is present when another person marks his or her ballot, the evidence must show that the defendant either procured the voter's ballot through means that were themselves corrupt (such as bribery or threats), or that the defendant marked the voter's ballot without the voter's consent or input. See *United States v. Boards*, 10 F.3d 587 (8th Cir. 1993); *Salisbury*; *Cole*.

D. STATUTES¹⁰

1. Conspiracy against rights: 18 U.S.C. 241

Section 241 makes it unlawful for two or more persons to "conspire to injure, oppress, threaten, or intimidate any person in any state, territory or district in the free exercise or enjoyment of any right or privilege secured by the Constitution or laws of the United States." Violations are punishable by imprisonment for up to ten years or, if death results, for any term of years or for life.

The Supreme Court long ago recognized that the right to vote for federal offices is among the rights secured by Article I, Sections 2 and 4, of the Constitution, and hence is protected by section 241. *United States v. Classic*, 313 U.S. 299 (1941); *Ex parte Yarborough*, 110 U.S. 651 (1884). Although the statute was enacted just after the Civil War to address efforts to deprive the newly emancipated slaves of the basic rights of citizenship, such

¹⁰ The text of the statutes discussed below is printed in Appendix A. Each statute carries, in addition to the prison term noted, fines applicable under 18 U.S.C. 3571.

as the right to vote, it has been interpreted to include any effort to derogate any right which flows from the Constitution or from federal law.

Section 241 has been an important statutory tool in election crime prosecutions. Originally held to apply only to schemes to corrupt elections for federal office, it has recently been successfully applied to non-federal elections as well, provided that state action was a necessary feature of the fraud. This state action requirement can be met not only by the participation of poll officials, but by the activities of persons who clothe themselves with the appearance of state authority by dressing like an authority figure, such as with uniforms, credentials, and badges. *Williams v. United States*, 341 U.S. 97 (1951).

Section 241 embraces conspiracies to stuff a ballot box with forged ballots, *United States v. Saylor*, 322 U.S. 385 (1944); *United States v. Mosley*, 238 U.S. 383 (1915); to impersonate qualified voters, *Crolich v. United States*, 196 F.2d 879 (5th Cir.), cert. denied, 344 U.S. 830 (1952); to alter legal ballots, *United States v. Powell*, 81 F. Supp. 288 (E.D. Mo. 1948); to fail to count votes and to alter votes counted, *Ryan v. United States*, 99 F.2d 864 (8th Cir. 1938), cert. denied, 306 U.S. 635 (1939); *Walker v. United States*, 93 F.2d 383 (8th Cir. 1937), cert. denied, 303 U.S. 644 (1938); to prevent the official count of ballots in primary elections, *Classic*; to destroy ballots, *United States v. Townsley*, 843 F.2d 1070 (8th Cir. 1988); to destroy voter registration applications, *United States v. Haynes*, 977 F.2d 583 (6th Cir. 1992) (table) (available at 1992 WL 296782); to illegally register voters and cast absentee ballots in their names, *United States v. Weston*, 417 F.2d 181 (4th Cir. 1969), cert. denied, 396 U.S. 1062 (1970); *United States v. Morado*, 454 F.2d 167 (5th Cir.), cert. denied, 406 U.S. 917 (1972); *Fields v. United States*, 228 F.2d 544 (4th Cir. 1955), cert. denied, 350 U.S. 982 (1956); and to injure, threaten, or intimidate a voter in the exercise of his right to vote, *Wilkins v. United States*, 376 F.2d 552 (5th Cir.), cert. denied, 389 U.S. 964 (1967).

The election fraud conspiracy need not be successful to violate this statute. *United States v. Bradberry*, 517 F.2d 498 (7th Cir. 1975). Nor need there be proof of an overt act. *Williams v. United States*, 179 F.2d 644 (5th Cir. 1950), aff'd on other grounds, 341 U.S. 70 (1951); *Morado*. Section 241 reaches conduct affecting the integrity of the federal election process as a whole, and does not require fraudulent action with respect to any particular voter. *United States v. Nathan*, 238 F.2d 401 (7th Cir. 1956), cert. denied, 353 U.S. 910 (1957).

On the other hand, section 241 does not reach schemes to corrupt the balloting process through voter bribery, *United States v. Bathgate*, 246 U.S. 220 (1918), even schemes that involve poll officers to ensure that the bribed voters mark their ballots as they were paid to, *United States v. McLean*, 808 F.2d 1044 (4th Cir. 1987) (noting, however, that section 241 may apply where vote buying occurs in conjunction with other corrupt practices, such as ballot box stuffing).

Section 241 prohibits only conspiracies to interfere with rights flowing directly from the Constitution or federal statutes. This element has led to considerable judicial speculation over the extent to which the Constitution protects the right to vote for candidates running for nonfederal offices. *Oregon v. Mitchell*, 400 U.S. 112 (1970); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Blitz v. United States*, 153 U.S. 308 (1894); *In re Coy*, 127 U.S. 731 (1888); *Ex parte Siebold*, 100 U.S. 371 (1880). See also *Duncan v. Poythress*, 657 F.2d 691 (5th Cir. 1981), cert. dismissed, 459 U.S. 1012 (1982). While dicta in *Reynolds* casts the parameters of the federally protected right to vote in extremely broad terms, in a ballot fraud case ten years later the Supreme Court specifically refused to decide whether the federally secured franchise extended to nonfederal contests. *Anderson v. United States*, 417 U.S. 211 (1974).

The use of section 241 in election fraud cases has generally been confined to two types of situations: "public schemes" and "private schemes."

A public scheme is one which involves the necessary participation of a public official acting under the color of law. In election fraud cases, the public official involved in the scheme is usually an election officer whose participation involves corruption of his office to dilute valid ballots with invalid ballots or to otherwise corrupt

an honest vote tally in derogation of the equal protection and due process clauses of the 14th Amendment. See, e.g. *United States v. Anderson*, 482 F.2d 685 (4th Cir. 1973, aff'd on other grounds, 417 U.S. 211 (1974)); *United States v. Stollings*, 501 F.2d 954 (4th Cir. 1974); *United States v. Olinger*, 759 F.2d 1293 (7th Cir.), cert. denied, 474 U.S. 839 (1985); *United States v. Howard*, 774 F.2d 838 (7th Cir. 1985); *United States v. Townsley*, 843 F.2d 1070 (8th Cir. 1988); *United States v. Haynes*, 799 F.2d 583 (6th Cir. 1992)(table)(available at 1992 WL 296782). Another case involving a public scheme turned on the necessary participation of a notary public who falsely notarized forged voter signatures on absentee ballot materials in an Indian tribal election. *United States v. Wadena*, 152 F.3d 831 (8th Cir. 1998), cert. denied, 526 U.S. 517 (1999).

A private scheme is a pattern of voter fraud which does not involve the necessary participation of a public official acting under color of law, but which can be shown factually to have adversely affected the ability of qualified voters to vote in elections where federal candidates were on the ballot. Examples of private schemes include voting fraudulent ballots in mixed elections, and schemes to thwart get-out-the-vote or ride-to-the-polls activities of political factions or parties through such methods as jamming telephone lines or vandalizing motor vehicles.

Public schemes may be prosecuted under section 241 regardless of the nature of the election with respect to which the conspiracy occurs, that is, elections with or without a federal candidate. On the other hand, private schemes can be prosecuted under section 241 only when the objective of the conspiracy was to corrupt a federal election or when the scheme can be shown to have affected, directly or indirectly, the vote count for a federal candidate, as for example would occur where fraudulent ballots were cast for an entire party ticket that included a federal office.

2. Deprivation of rights under color of law: 18 U.S.C. § 242

Section 242, also enacted as a post-Civil War statute, makes it unlawful for anyone acting under color of law, statute, ordinance, regulation, or custom to willfully deprive a person of any right, privilege, or immunity secured or protected by the Constitution or laws of the United States. Violations are misdemeanors unless bodily injury occurs, in which case the penalty is ten years, or unless death results, in which case imprisonment may be for any term of years or for life.

Prosecutions under section 242 need not show the existence of a conspiracy. However, the defendants must have acted illegally "under color of law", i.e., the case must involve a public scheme, as discussed above. This element does not require that the defendant be a de jure officer or a government official; it is sufficient if he or she jointly acted with state agents in committing the offense, *United States v. Price*, 383 U.S. 787 (1966), or if his or her actions were made possible by the fact that they were clothed with the authority of state law, *United States v. Williams*, 341 U.S. 97 (1951); *United States v. Classic*, 313 U.S. 299 (1941).

Because a section 242 violation can be a substantive offense for election fraud conspiracies prosecutable under section 241, the cases cited in the discussion of section 241 apply to section 242.

3. False information in, and payments for, registering and voting: 42 U.S.C. § 1973i(c)

Section 1973i(c) makes it unlawful, in an election in which a federal candidate is on the ballot, to knowingly and willfully (1) give false information as to name, address, or period of residence to an election official for the purpose of establishing one's eligibility to register or to vote; (2) pay, offer to pay, or accept payment for registering to vote or for voting; or (3) conspire with another person to vote illegally. Violations are punishable by imprisonment for up to five years.

a) The basis for federal jurisdiction¹¹

Congress added section 1973i(c) to the 1965 Voting Rights Act to ensure the integrity of the balloting process in the context of an expanded franchise. In so doing, Congress intended that section 1973i(c) have a broad reach. In fact, the original version of section 1973i(c) would have applied to all elections. However, because of constitutional concerns raised during congressional debate on the bill, the provision's scope was narrowed to elections including a federal contest. Section 1973i(c) rests Congress's power to regulate federal elections and on the Necessary and Proper Clause. U.S. Const. art. I, '4, art. I § 8, cl. 18. *United States v. Slone*, 411 F.3d 643 (5th Cir. 2005); *United States v. Bowman*, 636 F.2d 1003 (5th Cir. 1981); *United States v. Malmay*, 671 F.2d 869 (5th Cir. 1982); *United States v. Carmichael*, 685 F.2d 903 (4th Cir. 1982), cert. denied, 459 U.S. 1202 (1983); *United States v. Cole*, 41 F.3d 303 (7th Cir. 1994); *United States v. McCranie*, 169 F.3d 723 (11th Cir. 1999); and *United States v. Cianciulli*, 482 F. Supp. 585 (E.D. Pa. 1979).

Section 1973i(c) has been held to protect two distinct aspects of a federal election: the actual results of the election, and the integrity of the process of electing federal officials. *United States v. Cole*, 41 F.3d 303 (7th Cir. 1994). In *Cole*, the court held that federal jurisdiction is satisfied so long as single federal candidate is on the ballot -- even if the federal candidate is unopposed -- because fraud in a mixed election automatically has an impact of the integrity of the election. See also *United States v. McCranie*, 169 F.3d 723 (11th Cir. 1999), and *United States v. Slone*, 411 F.3d 643 (6th cir. 2005), both of which followed *Cole* and achieved the same result.

Section 1973i(c) is particularly useful for two reasons. It eliminates the unresolved issue of the scope of the constitutional right to vote in matters not involving racial discrimination, and eliminates the need to prove that a given pattern of corrupt conduct had an actual impact on a federal election. It is sufficient under section 1973i(c) that a pattern of corrupt conduct took place during a mixed election; in that situation it is presumed that the fraud will expose the federal race to potential harm. *Slone*, supra; *Cole*, supra; *United States v. Olinger*, 759 F.2d 1293 (7th Cir.), cert. denied, 474 U.S. 839 (1985); *United States v. Saenz*, 747 F.2d 930 (5th Cir. 1984), cert. denied, 473 U.S. 906 (1985); *United States v. Garcia*, 719 F.2d 99 (5th Cir. 1983); *United States v. Carmichael*, 685 F.2d 903 (4th Cir. 1982), cert. denied, 459 U.S. 1202 (1983); *United States v. Mason*, 673 F.2d 737 (4th Cir. 1982); *United States v. Malmay*, 671 F.2d 869 (5th Cir. 1982); *United States v. Bowman*, 636 F.2d 1003 (5th Cir. 1981); *United States v. Sayre*, 522 F. Supp. 973 (W.D. Mo. 1981); *United States v. Simms*, 508 F. Supp. 1179 (W.D. La. 1979).

Cases arising under this statute which involve corruption of the process by which individuals register to vote, as distinguished from the circumstances under which they actually vote, present a different federal jurisdictional issue, which is easily satisfied. This is because voter registration in every State in the United States is "unitary" in the sense that one registers to vote only once in order to become eligible to vote for all candidates on the ballot, local, state, and federal. Although a state could choose to maintain separate registration lists for federal and non-federal elections, at the time this book was written no state had chosen to do so. Consequently, any corrupt act which impacts on the voter registration process and which can be reached under 42 U.S.C. 1973i(c) satisfies this

¹¹ The discussion presented here concerning the basis for federal jurisdiction under section 1973i(c) applies equally to its companion statute, 42 U.S.C. § 1973i(e), which addresses multiple voting. This is because the federal jurisdictional predicate is phrased precisely the same way in both statutes.

federal jurisdictional requirement. An excellent discussion of this issue is contained in *United States v. Ciancuilli*, 462 F. Supp. 585 (E.D. Pa. 1979).

b) False information to an election official

The "false information" provision of section 1973i(c) prohibits any person from furnishing certain false data to an election official to establish eligibility to register or vote. The statute applies to only three types of information: name, address, and period of residence in the voting district. False information concerning other factors (such as citizenship, felon status, and mental competence) are not covered by this provision.¹²

As just discussed, registration to vote is "unitary," in that a single registration qualifies the applicant to cast ballots for all elections. Thus, the jurisdictional requirement that the false information have been made to establish eligibility to vote in a federal election is satisfied automatically wherever a false statement is made to get one's name on the registration rolls. *United States v. Barker*, 514 F.2d 1077 (7th Cir. 1975); *Ciancuilli*, supra.

On the other hand, where the false data is furnished to poll officials for the purpose of enabling a voter to cast a ballot in a particular election (as when one voter attempts to impersonate another), it must be shown that a federal candidate was being voted upon at the time. In such situations, the evidence should show that the course of fraudulent conduct could have jeopardized the integrity of the federal race, or, at a minimum, that the name of a federal candidate was on the ballot. *Carmichael, Bowman, Malmay, McCrainie*, supra. See, e.g., *In re Coy*, 127 U.S. 731 (1888). Situations involving a voter impersonating another in order to vote for a non-federal candidate may be inadequate to establish federal jurisdiction. See *Blitz v. United States*, 153 U.S. 308 (1894).

In *United States v. Boards*, 10 F.3d 587 (8th Cir. 1993), the Eighth Circuit confirmed the broad reach of the "false information" provision of section 1973i(c). The defendants in this case, and their unidentified coconspirators, had obtained and marked the absentee ballots of other registered voters by forging the voters' names on ballot applications and directing that the ballots be sent to a post office box without the voters' knowledge. The district court granted post-verdict judgments of acquittal as to those counts in which the defendant's role was limited to fraudulently completing an application for an absentee ballot, based on its conclusions that (1) the statute did not extend to ballot applications, (2) the statute did not cover giving false information as to the names of real voters (as opposed to fictitious names), and (3) the defendants could not be convicted for completing the applications when others actually voted the ballots.

The Court of Appeals rejected each of these narrow interpretations of section 1973i(c). It held that an application for a ballot falls within the broad definition of "vote" in the Voting Rights Act, "because an absentee voter must first apply for an absentee ballot as a 'prerequisite to voting.'" 10 F.3d at 589 (quoting 42 U.S.C. ' 1973i(c)(1)). The Court also held that by using the names of real registered voters on the applications, the defendants "[gave] false information as to [their] name[s]" within the meaning of section 1973i(c). *Id.* Finally, the Court held that one of the defendants, whose role was limited to completing absentee ballot applications for ballots that others fraudulently voted, was liable under 18 U.S.C. ' 2 as an aider and abettor.

¹² Such matters might, however, be charged as conspiracies to encourage illegal voting under the conspiracy clause of section 1973i(c), as citizenship offenses under, *inter alia*, 18 U.S.C. 911 and § 1015(f), or under the broad "false information" provision of 42 U.S.C. § 1973gg-10. These statutes will be discussed below.

In *United States v. Smith*, 231 F.3d 800 (11th Cir. 2000), the Court of Appeals for the 11th Circuit held that each forgery of a voter's name on a ballot document or on an application for a ballot constituted a separate offense under the "false information as to name" clause of section 1973i(c).

Section 1973i(c)'s false information clause is particularly useful when the evidence shows that a voter's signature (name) was forged on an election-related document; e.g., when signatures on poll lists are forged by election officials who are stuffing a ballot box, when a voter's signature on an application for an absent ballot is forged, or where bogus voter registration documents are fabricated in order to get names on voter registries.

c) Commercialization of the vote -- Vote Buying

Vote buying is a particularly pernicious, and in some parts of the United States relatively common, type of electoral crime. This is because the cornerstone of "democracy," as that concept is generally understood in the United States, is that the governors serve the governed, and that they are held accountable to the people for their public stewardship of the public's affairs through the ballot box. Vote buying attacks that critical dynamic at its core. Those who are targets of vote buying schemes never include the powerful, the rich or the privileged. Rather, vote buying targets the poor, the dispossessed, the socially dependent and the culturally challenged. Yet those are precisely the people who need the vote the most! Where vote buying occurs, the political debt that the public officials involved owe to such citizens is discharged up front and usually in cash. As long as politicians are confident that they can win elections by giving voters small gifts to get them to the polls or to reward them for voting, those politicians have absolutely no motive or reason to be responsive to the usually very real needs of the challenged segment of society whose votes have been bought.

For this reason, vote buying offenses, as discussed more fully below, have represented a sizable segment of the federal election crime docket in modern times.

The clause of section 1973i(c) that prohibits "vote buying" does so in broad terms, covering any payment made or offered to a would-be voter "to vote or for voting" in an election where the name of a federal candidate appears on the ballot, as well as payments made to induce unregistered persons to register.¹³ Section 1973i(c) applies as long as a pattern of vote buying exposes a federal election to potential corruption, even though it cannot be shown that the threat materialized.

This aspect of section 1973i(c) is directed at eliminating pecuniary considerations from the voting process. *Garcia*; *Mason*; *Malmay*; *Bowman*, *supra*. The statute rests on the premises that potential voters can choose not to vote; that those who choose to vote have a right not to have the voting process diluted with ballots that have been procured through bribery; and that the selection of the nation's leaders should not degenerate into a spending contest, with the victor being the candidate who can pay the most voters. See also *United States v. Blanton*, 77 F. Supp. 812, 816 (E.D. Mo. 1948).

The payment may be anything having monetary value, including cash, liquor, lottery chances, and welfare benefits such as food stamps. *Garcia*, 719 F.2d at 102. However, offering free rides to the polls or providing employees paid leave while they vote are not prohibited. *United States v. Lewin*, 467 F.2d 1132 (7th Cir.

¹³ The federal criminal code contains another vote buying statute, 18 U.S.C. § 597, which has a narrower scope and provides for lesser penalties than section 1973i(c). Section 597 prohibits making or offering to make an expenditure to any person to vote or withhold his or her vote for a federal candidate. Nonwillful violations of section 597 are one-year misdemeanors; willful violations are two-year felonies. Sections 597 and 1973i(c) are distinct offenses, since each requires proof of an element that the other does not. *Whalen v. United States*, 445 U.S. 684 (1980); *Blockburger v. United States*, 284 U.S. 299 (1932). Section 597 requires that the payment be made to influence a federal election; section 1973i(c) requires that the defendant have acted "knowingly and willfully." Section 597 is primarily useful in plea negotiations as an alternative to section 1973i(c).

1972). Such things are given to make it easier for people to vote, not to induce them to do so. This distinction is important. For an offer or a payment to violate section 1973i(c) it must have been intended to induce or reward the voter for engaging in one or more acts necessary to cast a ballot. Section 1973i(c) does *not* prohibit offering or giving things having theoretical pecuniary value, such as a ride to the polls or time off from work, to individuals who have already made up their minds to vote solely to facilitate their doing so.

Moreover, payments made for some purpose other than to induce or reward voting activity, such as remuneration for campaign work, do not violate this statute. See *United States v. Canales*, 744 F.2d 413 (5th Cir. 1984), cert. denied, 473 U.S. 906 (1985). Similarly, section 1973i(c) does not apply to payments made to signature-gatherers for voter registrations such individuals may obtain, a practice sometimes referred to as "bounty hunting." Such payments become actionable under section 1973i(c) only if they are shared with the person being registered.

The federal crime of vote buying in the United States also does not cover the interjection of partisan political considerations into an otherwise legally defensible award of government grants or benefits to a body politic. For example, it is not a "vote buying" crime in the United States for an incumbent administration to award a road construction project to a geographic area that is viewed as being politically competitive, provided that there is an otherwise objective valid public need for the project. Vote buying in the United States is personal in nature, in the sense that the benefit that represents the corpus of the corrupt payment must have been offered or accepted to an individual voter rather than non-personally to a segment of a body politic.

The improper use of state resources for partisan political purposes also does not violate the vote buying provisions of Section 1973i(c). However, embezzling state resources or assets by allowing them to be used by political candidates or parties to further campaigning activities can be prosecuted under criminal laws dealing with embezzlement and theft of government property.

Finally, section 1973i(c) does not require that the offer or payment have been made with a specific intent to influence a federal contest - - or for that matter that it was offered or given to influence votes cast for any particular candidate or party. It is sufficient that the name of a federal candidate appeared on the ballot in the election where the payment or offer of payment occurred, and that the payment or offer of payment have been "for voting" as distinguished from some other sort of activity. *Slone* (payments to influence vote for county judge executive); *Garcia* (providing food stamps to influence vote for candidates running for county judge and county commissioner); *United States v. Thompson*, 615 F.2d 329 (5th Cir. 1980), *Carmichael*, *Mason*, *Sayre* (payments to influence votes for candidates running for sheriff or other local offices); *Simms* (payments to vote for a state judicial post); *Malmay* (payments to vote for school board member); *United States v. Odom*, 858 F.2d 664 (11th Cir. 1988) (payments for votes for a state representative); *United States v. Campbell*, 845 F.2d 782 (8th Cir. 1988), cert. denied, 488 U.S. 965 (1989) (payments to benefit a candidate for county judge); *United States v. Daugherty*, 952 F.2d 969 (8th Cir. 1991) (payments to vote for a number of local candidates); *McCrainie* (payments to influence election for sheriff where the name of an unopposed federal candidate appeared on the ballot).

d) Conspiracy to cause illegal voting

The second clause of section 1973i(c) criminalizes conspiracies to encourage "illegal voting." The phrase "illegal voting" is not defined in the statute. On its face it encompasses unlawful conduct in connection with voting. Violations of this provision are felonies.

The "illegal voting" clause of section 1973i(c) has potential application to those who undertake to cause others to register or vote in conscious derogation of state or federal laws. *Cianciulli*, 482 F. Supp. at 616 (noting that this clause would prohibit "vot[ing] illegally in an improper election district"). For example, all states require voters to be United States citizens, and most states disenfranchise people who have been convicted of certain crimes,

who are mentally incompetent, or who possess other disabilities which may warrant restriction of the right to vote.¹⁴

This provision requires that the voter have been a participant in the conspiracy. Cases brought under this clause thus should include proof that the voter was actively aware that he or she was not eligible to vote and was registering or voting illegally. However, the statute criminalizes only the conduct of the person who encourages an ineligible voter to register or an eligible voter to vote illegally -- not the conduct of the voter.

The conspiracy provision of section 1973i(c) applies only to the statute's "illegal voting" clause. Olinger, 759 F.2d at 1298-1300. Conspiracies arising under the other clauses of section 1973i(c) (that is, those involving vote buying or fraudulent registration) should be charged under the general federal conspiracy statute, 18 U.S.C. ' 371.

4. Voting more than once: 42 U.S.C. § 1973i(e)

Section 1973i(e), enacted as part of the 1975 amendments to the Voting Rights Act of 1965, makes it a crime to vote "more than once" in any election in which a federal candidate is on the ballot. Violations are punishable by imprisonment for up to five years.

The federal jurisdictional basis for this statute is identical to that for 42 U.S.C. § 1973i(c), which is discussed in detail in the previous item.

Section 1973i(e) is most useful as a statutory weapon against frauds which do not involve the participation of voters in the balloting acts attributed to them. Examples of such frauds are schemes to cast ballots in the names of voters who were deceased or absent, *United States v. Olinger*, 759 F.2d 1293 (7th Cir.), cert. denied, 474 U.S. 839 (1985); schemes to exploit the infirmities of the mentally handicapped by casting ballots in their names. *United States v. Odom*, 736 F.2d 104 (4th Cir. 1984); and schemes to cast absentee ballots in the names of voters who did not participate in and consent to the marking of their ballots by the offender. *United States v. Smith*, 231 F.3d 800 (11th Cir. 2000).

Most cases prosecuted under the multiple voting statute have involved defendants who physically marked ballots outside the presence of the voters in whose names they were cast -- in other words, without the voters' participation or knowledge. The statute may also be applied successfully to schemes where the voters are present but do not participate in any way, or otherwise consent to the defendant's assistance, in the voting process.

¹⁴ False statements involving any fact which is material to registering or voting under state law may also be prosecuted under 42 U.S.C. § 1973gg-10, as will be discussed below.

However, when the scheme involves "assisting" voters who both are present and marginally participate in the process, such as by signing a ballot document, prosecuting the case under section 1973i(e) may present difficulties. For instance, in *United States v. Salisbury*, 983 F.2d 1369 (6th Cir. 1993), the defendant got voters to sign their absentee ballot forms and then instructed them how to mark their ballots, generally without allowing them to choose the candidates -- and in some cases even to know the identity of the candidates on the ballot. In a few cases the defendant also personally marked others' ballots. The Sixth Circuit held that the concept "votes more than once" in section 1973i(e) was unconstitutionally vague as applied to these facts. Because the phrase "votes more than once" was not defined in the statute, the court found the phrase did not clearly apply when the defendant did not physically mark another's ballot. The court further held that even if the defendant did mark another's ballot, it wasn't clear this was an act of "voting" by the defendant if the defendant got the ostensible voters to demonstrate "consent" by signing their names to the accompanying ballot forms. *Salisbury* at 1379.¹⁵

A year after *Salisbury*, the Seventh Circuit took a different approach -- with the benefit of more detailed jury instructions. *United States v. Cole*, 41 F.3d 303 (7th Cir. 1994).¹⁶ In both cases, the defendants had marked absentee ballots of other persons after getting the voters to sign their ballot documents. The Seventh Circuit rejected the Sixth Circuit's contention that the term "vote" was unconstitutionally vague, finding that the term was broadly and adequately defined in the Voting Rights Act itself, 42 U.S.C. ' 1973L(c)(1), and that this

¹⁵ The *Salisbury* Court noted that in *United States v. Hogue*, 812 F.2d 1568 (11th Cir. 1987), the jury was instructed that illegal voting under section 1973i(e) included marking another person's ballot without his or her "express or implied consent," but found that, on the facts of *Salisbury*, the jury should also have been given definitions of "vote" and "consent." *Salisbury* at 1377.

¹⁶ After discussing the Sixth Circuit's reasoning, the Seventh Circuit expressly declined to follow it. The *Cole* decision was written by a judge of the Eleventh Circuit, sitting by designation. *Cole* thus also may have some value in the Eleventh Circuit.

statutory definition was supported by both the dictionary and commonly understood meaning of the word. The court held that the facts established a clear violation by the defendant of the multiple voting prohibition in section 1973i(c).¹⁷

In addition to their conflicting holdings, the Salisbury and Cole opinions differ in their approach to so-called voter "assistance" cases. Salisbury focused on the issue of voter consent -- that is, whether the voters had, by their conduct, in some way "consented" to having the defendant mark, or help them mark, their own ballots. Cole, on the other hand, focused on whether it was the voter or the defendant who actually expressed candidate preferences.

In a more recent case, the Eleventh Circuit followed the rationale in Cole with respect to a scheme to obtain and cast ballots for indigent voters without their knowledge or consent. Smith, supra. The court even went so far as to note that, in its view, a section 1973i(e) offense could lie regardless of whether the voter had consented to another's marking his ballot. Smith at 816, fn. 20.

While the approach taken in Cole and Smith is, from a prosecutor's perspective, preferable to Salisbury's, the latter's discussion of the issue of possible voter "consent" remains important, since facts suggesting the possibility of consent may weaken the evidence of fraud. Taken together, these three cases suggest the following approach to voter "assistance" frauds:

- The use of section 1973i(e) should generally be confined to what amounts to clear "ballot theft." Examples of such situations are where the defendant marked the ballots of others without their input; where voters did not knowingly consent to the defendant's participation in their voting transactions; where the voters' electoral preferences were disregarded; or where the defendant marked the ballots of voters who lacked the mental capacity to vote or to consent to the defendant's activities.
- Jury instructions for a section 1973i(e) indictment should amplify the key term "votes more than once" in the context of the particular case, and specifically define the terms "vote," and, where appropriate, "consent" and "implied consent." See 42 U.S.C. § 1973i(c)(1) (containing an extremely broad definition of "vote") and United States v. Boards, 10 F.3d 587, 589 (8th Cir. 1993) (holding that this definition encompasses applying for an absentee ballot).

Thus, while the clearest use of section 1973i(e) is to prosecute pure ballot forgery schemes, the statute can also apply to other types of schemes where voters are manipulated, misled, or otherwise deprived of their votes. See Cole at 310-311 (witness believed the defendant was merely registering her to vote, not helping her vote). Schemes to steal the votes of the elderly, infirm, or economically disadvantaged may constitute multiple voting if there is a clear absence of meaningful voter participation. Because of their vulnerability, these persons are frequent targets of ballot schemes, and often do not even know that their ballots have been stolen or their

¹⁷ "Ordinary people can conclude that the absentee voters were not expressing their wills or preferences, i.e., that Cole was using the absentee voters' ballots to vote his will and preferences." Cole at 308.

voting choices ignored; furthermore, if they have been intimidated, they are generally reluctant to say so.

There is a significant evidentiary difference between voter intimidation and multiple voting that suggests that the multiple voting statute may often become the preferred charging statute for voter "assistance" frauds. Voter intimidation requires proof of a difficult element: the existence of physical or economic intimidation that is intended by the defendant and felt by the victim. In contrast, the key element in a multiple voting offense is whether the defendant voted the ballot of another person without consulting with that person or taking into account his or her electoral preferences.

In conclusion, if the facts show manipulation of what the United States Sentencing Guidelines call "vulnerable victims" for the purpose of obtaining control over the victims' ballot choices, the use of section 1973i(e) as a prosecutive theory should always be considered.

5. Voter intimidation

Voter intimidation schemes are the functional opposite of voter bribery schemes. In the case of voter bribery, voting activity is stimulated by offering or giving something of value to individuals to induce them to vote or reward them for having voted. The goal of voter intimidation, on the other hand, is to deter or influence voting activity through threats to deprive voters of something they already have, such as jobs, government benefits, or, in extreme cases, their personal safety. Another distinction between voter bribery and intimidation is that bribery generates concrete evidence: the bribe itself (generally money). Intimidation, on the other hand, is amorphous and largely subjective in nature, and lacks such concrete evidence.

Voter intimidation is an assault against both the individual and society, warranting prompt and effective redress by the criminal justice system. Yet a number of factors make it difficult to prosecute. The intimidation is likely to be both subtle and without witnesses. Furthermore, voters who have been intimidated are not merely victims; it is their testimony that proves the crime. These voters must testify, publicly and in an adversarial proceeding, against the very person who intimidated them. Obtaining this crucial testimony can be difficult.

The crime of voter "intimidation" normally requires evidence of threats, duress, economic coercion, or some other aggravating factor which tends to improperly induce conduct on the part of the victim. If such evidence is lacking, an alternative prosecutive theory may apply to the facts, such as multiple voting in violation of 42 U.S.C. ' 1973i(e). Indeed, in certain cases the concepts of "intimidation" and voting "more than once" may overlap and even merge. For example, a scheme which targets the votes of persons who are mentally handicapped, economically depressed, or socially vulnerable may involve elements of both crimes. Because of their vulnerability, these persons are often easily manipulated -- without the need for inducements, threats, or duress. In such cases, the use of section 1973i(e) as a prosecutive theory should be considered. See *United States v. Odom*, 736 F.2d 104 (4th Cir. 1984).

The main federal criminal statutes that can apply to voter intimidation are: 18 U.S.C. " 241, 242, 245(b)(1)(A), 594, and two statutes enacted in 1993, 18 U.S.C. ' 610 and 42 U.S.C. ' 1973gg-10(1). Each of these statutes is discussed below.

a) Intimidation in voting and registering to vote:

42 U.S.C. § 1973gg-10(1)

Congress enacted the National Voter Registration Act (NVRA), 42 U.S.C. " 1973gg-1973gg-10, in 1993. The principal purpose of this legislation was to require that the states provide prospective voters with uniform and convenient means by which to register for the federal franchise. In response to concerns that relaxing registration requirements might lead to an increase in election fraud, the NVRA also included a new series of

election crimes, one of which prohibited knowingly and willfully intimidating or coercing prospective voters for registering to vote, or for voting, in any election for federal office. 42 U.S.C. § 1973gg-10(1). Violators are subject to imprisonment for up to five years.

As with other statutes addressing voter intimidation, in the absence of any jurisprudence to the contrary, it is the Criminal Division's position that section 1973gg-10(1) applies only to intimidation which is accomplished through the use of threats of physical or economic duress. Voter "intimidation" accomplished through less drastic means may present violations of the Voting Rights Act, 42 U.S.C. § 1973i(b), which are enforced by the Civil Rights Division through noncriminal remedies.

The jurisdictional element for section 1973gg-10(1) is "in any election for Federal office." This is slightly different phraseology than that used in sections 1973i(c) and i(e), discussed above. In matters involving intimidation in connection with voter *registration*, this jurisdictional element is satisfied in every case because voter registration is unitary in all 50 states: i.e., one registers to vote only once to become eligible to vote for federal as well as non-federal candidates. However, when the intimidation occurs in connection with *voting*, the jurisdictional situation may not be as clear. Although at the time this book was written there had been no jurisprudence on the issue, the Criminal Division believes that in *voting* intimidation matters, federal prosecutors should exercise caution by ensuring that the vote corrupted by the intimidation included marking the victim's ballot for a federal candidate. Unlike sections 1973i(c) and i(e), the mere presence of a federal candidate's name on the ballot may not be sufficient to satisfy the jurisdictional predicate of this statute.

b) Intimidation of voters: 18 U.S.C. § 594

Section 594 prohibits intimidating, threatening, or coercing anyone, or attempting to do so, for the purpose of interfering with an individual's right to vote or not vote in any election held in whole or in part to elect a federal candidate. The statute does not apply to primaries. Violations are one-year misdemeanors.

The operative words in section 594 are "intimidates," "threatens," and "coerces." The scienter element requires proof that the actor intended to force voters to act against their will by placing them in fear of losing something of value. The feared loss may be of something tangible, such as money or economic benefits, or intangible, such as liberty or safety.

Section 594 was enacted as part of the original 1939 Hatch Act, which aimed at prohibiting the blatant economic coercion used during the 1930s to force federal employees and recipients of federal relief benefits to perform political work and to vote for and contribute to the candidates supported by their supervisors. The congressional debates on the Hatch Act show that Congress intended section 594 to apply where persons were placed in fear of losing something of value for the purpose of extracting involuntary political activities. 84 Cong. Rec. 9596-611 (1939). Although the impetus for the passage of section 594 was Congress's concern over the use of threats of economic loss to induce political activity, the statute also applies to conduct which interferes, or attempts to interfere, with an individual's right to vote by placing him or her in fear of suffering other kinds of tangible and intangible losses. It thus criminalizes conduct intended to force prospective voters to vote against their preferences, or refrain from voting, through activity reasonably calculated to instill some form of fear in them.¹⁸

¹⁸ In recent years, the civil counterparts to section 594, 42 U.S.C. §§ 1971b and 1973(b), have been used to combat nonviolent voter intimidation. See, e.g., *United States v. North Carolina Republican, No. 91-161-Civ-5F* (E.D.N.C., consent decree entered Feb. 27, 1992) (consent order entered against political organizations for mailing to thousands of minority voters postcards that contained false voting information and a threat of prosecution).

c) Coercion of political activity: 18 U.S.C. § 610

Section 610 was enacted as part of the 1993 Hatch Act Reform Amendments to provide increased protection against political manipulation of federal employees in the executive branch.¹⁹ It prohibits intimidating or coercing a federal employee to induce or discourage "any political activity" by the employee. Violators are subject to imprisonment for up to three years. This statute is discussed in detail in Chapter Two, which addresses patronage crimes.

Although the class of persons covered by section 610 is limited to federal employees, the conduct covered by this new statute is broad: it reaches political activity which relates to any public office or election, whether federal, state, or local. The phrase "political activity" in section 610 expressly includes, but is not limited to, "voting or refusing to vote for any candidate or measure," "making or refusing to make any political contribution," and "working or refusing to work on behalf of any candidate."

d) Conspiracy against rights and deprivation of constitutional rights:
18 U.S.C. §§ 241 and 242

Section 241 makes it a ten-year felony to "conspire to injure, oppress, threaten, or intimidate any person in any state, territory or district in the free exercise or enjoyment of any right or privilege secured by the Constitution or laws of the United States" -- including the right to vote. The statute, which is discussed in detail above, has potential application to two forms of voter intimidation: a conspiracy to prevent persons whom the subjects knew were qualified voters from entering the polls to vote in an election where a federal candidate is on the ballot, and a conspiracy to misuse state authority to prevent qualified voters from voting for any candidate in any election.

Section 241 has been successfully used to prosecute intimidation in connection with political activities. *Wilkins v. United States*, 376 F.2d 552 (5th Cir.)(en banc), cert. denied, 389 U.S. 964 (1967). *Wilkins* involved both violence and clear racial animus. It arose out of the shooting of a participant in the 1965 Selma-to-Montgomery voting rights march. The marchers had intended to present to the Governor of Alabama a petition for redress of grievances, including denial of their right to vote. The Fifth Circuit held that those marching to protest denial of their voting rights were exercising "an attribute of national citizenship, guaranteed by the United States," and that shooting one of the marchers therefore violated section 241. 376 F.2d at 561.

¹⁹ A similar statute addresses political intimidation within the military. 18 U.S.C. § 609. It prohibits officers of the United States armed forces from misusing military authority to coerce members of the military to vote for a federal, state, or local candidate. Violations are five-year felonies. In addition, 18 U.S.C. § 593 makes it a five-year felony for a member of the military to interfere with a voter in any general or special election, and 18 U.S.C. § 596 makes it a misdemeanor to poll members of the armed forces regarding candidate preferences.

Section 242, as also discussed above, makes it a misdemeanor for any person to act "under color of any law, statute, ordinance, regulation, or custom," knowingly and willfully to deprive any person in a state, territory, or district of a right guaranteed by the Constitution or federal law. For all practical purposes, this statute embodies the substantive offense for a section 241 conspiracy and it therefore can apply to voter intimidation.

It is the Criminal Division's position that sections 241 and 242 may be used to prosecute schemes the object of which was to intimidate voters in federal elections through threats of physical or economic duress, or to prevent otherwise lawfully qualified voters from getting to the polls in elections where federal candidates are on the ballot. Examples of the latter include intentionally jamming telephone lines to disrupt a political party's get-out-the-vote or "ride-to-the-polls" efforts, and schemes to vandalize motor vehicles a political faction or party intended to use to get voters to the polls.

e) Federally protected activities: 18 U.S.C. § 245(b)(1)(A)

The Civil Rights Act of 1968 contains a broad provision that addresses violence intended to intimidate voting in any election in this country. 18 U.S.C. § 245(b)(1)(A). This provision applies without regard to the presence of racial or ethnic factors.

Section 245(b)(1)(A) makes it illegal to use or threaten to use physical force to intimidate individuals from, among other things, "voting or qualifying to vote." It reaches threats to use physical force against a victim because the victim has exercised his or her franchise, or to prevent the victim from doing so. Violations are misdemeanors if no bodily injury results, and ten-year felonies if it does; if death results, the penalty is life imprisonment.

Prosecutions under section 245 require written authorization by the Attorney General, the Deputy Attorney General, the Associate Attorney General, or a specifically designated Assistant Attorney General, who must certify that federal prosecution of the matter is "in the public interest and necessary to secure substantial justice." § 245(a)(1). This approval requirement was imposed in response to federalism issues which many Members of Congress believed were inherent in a statute giving the federal government prosecutive jurisdiction over what otherwise would be mere assault and battery cases. See 1968 U.S.C.C.A.N. 1837-67 (Judiciary Committee Report on H.R. 2516). In making the required certification under section 245(b)(1)(A), the standard to be applied by the Attorney General is whether the facts of the particular matter are such that the appropriate state law enforcement authorities should, but either cannot or will not, effectively enforce the applicable state law, thereby creating an overriding need for federal intervention. 1968 U.S.C.C.A.N. 1845-48 (Judiciary Committee Report on H.R. 2516).

6. Fraudulent registering and voting: 42 U.S.C. § 1973gg-10(2)

This provision was enacted as part of the National Voter Registration Act of 1993 (NVRA). As discussed above, Congress enacted the NVRA to ease voter registration requirements throughout the country. The major goal of this legislation was to promote the exercise of the franchise by replacing diverse state voter registration requirements with uniform and more convenient registration options, such as registration by mail, when applying for a driver's license, and at various government agencies.

In addition, the NVRA sought to protect the integrity of the electoral process and the accuracy of the country's voter registration rolls. To further this goal, a new criminal statute was enacted which specifically addressed two common forms of electoral corruption: intimidation of voters (42 U.S.C. § 1973gg-10(1), discussed above), and fraudulent registration and voting. 42 U.S.C. § 1973gg-10(2). Violations of this statute are punishable by imprisonment for up to five years.

The NVRA's criminal statute resulted from law enforcement concerns expressed during congressional debates on the proposed law. Opponents and supporters of the NVRA alike recognized that relaxing requirements for registering to vote had the unavoidable potential to increase the occurrence of election crime by making it easier for the unscrupulous to pack registration rolls with fraudulent applications and ballots.

The constitutional basis of the NVRA is Congress's broad power to regulate the election of federal officials. NVRA's criminal provision reflects this federal focus, and is limited to conduct which occurs "in any election to Federal office." The phrasing of this jurisdictional element differs somewhat from the jurisdictional language used by Congress in earlier election fraud statutes, which required only that the name of a federal candidate be on the ballot.²⁰ While the Department believes that the jurisdictional language used in section 1973gg-10 was included to achieve the same result as the jurisdictional element for sections 1973i(c) and i(e), prosecutors and investigators wishing to proceed under section 1973gg-10 should be sensitive to the differences in its jurisdictional phraseology and when proceeding under section 1973gg-10 should be prepared to prove that the fraud in question either pertained to voter registration or that it affected, at least indirectly, the vote count for the federal candidate(s) on the ballot.

a) Fraudulent registration: § 1973gg-10(2)(A)

Subsection 1973gg-10(2)(A) prohibits any person, in an election for federal office, from defrauding or attempting to defraud the residents of a state of a fair and impartially conducted election by procuring or submitting voter registration applications that the offender knows are materially false or defective under state law. The scope of the statute is broader than that of the "false information" provision of section 1973i(c), discussed above, which is limited to false information involving only name, address, or period of residence. The statute applies to any false information that is material to a registration decision by an election official. For this reason, the provision is likely to be the statute of preference for most false registration matters.

For schemes to submit fraudulent registration applications, the statute's "federal office" jurisdictional element is automatically satisfied and hence does not present a problem. This is because registration to vote is unitary in all

states, in the sense that in registering to vote an individual becomes eligible to vote in all elections, nonfederal as well as federal.

b) Fraudulent voting: § 1973gg-10(2)(B)

Subsection 1973gg-10(2)(B) prohibits any person, in an election for federal office, from defrauding or

²⁰ Those earlier statutes, sections 1973i(c) and (e), contain express references to each federal office (Member of the House, Member of the Senate, President, Vice President, presidential elector) and type of election (primary, general, special) providing potential federal jurisdiction. The revised language seems to have been intended as a less cumbersome rephrasing of the required federal nexus. However, at the time this book was written there was no jurisprudence on this point.

attempting to defraud the residents of a state of a fair election through casting or tabulating ballots that the offender knows are materially false or fraudulent under state law. Unlike other ballot fraud laws discussed in this chapter, the focus of this provision is not on any single type of fraud, but rather on the result of the false information: that is, whether the ballot generated through the false information was defective and void under state law. Because of the conceptual breadth of the new provision, it may become a useful alternative to general fraud statutes in reaching certain forms of election corruption.

The statute's jurisdictional element, "in any election for Federal office," restricts its usefulness for fraudulent voting (as opposed to fraudulent registration) schemes. This subsection of the statute applies only to elections which include a federal candidate. Thus its scope is similar to that of 42 U.S.C. " 1973i(c) and (e), and arises from the fact that fraudulent activity aimed at any race in a mixed election has the potential to taint the integrity of the federal race.

7. Voting by noncitizens

Federal law does not expressly require that persons be United States citizens in order to vote. Eligibility to vote is a matter which the Constitution leaves primarily to the states. At the time this book was written, all states required that prospective voters be United States citizens.

In 1993, the federal role in the election process expanded substantially with the passage of the National Voter Registration Act (NVRA). This legislation required, among other things, that forms used to register voters clearly state that citizenship is a voting prerequisite, and that persons registering to vote in federal elections affirm that they are United States citizens. 42 U.S.C. §§ 1973gg-3(c)(2)(c), 1973gg-5(a)(6)(A)(I), 1973gg-7(b)(2). Nine years later, this requirement was reemphasized with respect to individuals who register to vote by mail. The Help America Vote Act of 2002 required the states to place a citizenship question on forms used by individuals under the "registration by mail" feature of NVRA. 42 U.S.C. § 15483(b)(4)(A).

Voting by noncitizens is covered by four separate federal criminal laws:

a) Fraudulent registration and voting under the NVRA: 42 U.S.C. 1973gg-10

The NVRA enacted a new criminal statute that reaches the knowing and willful submission to election authorities of false information which is material under state law. 42 U.S.C. ' 1973gg-10(2). Because all states make citizenship a prerequisite for voting, statements by prospective voters concerning citizenship status are automatically "material" within the meaning of this statute.

Therefore, any false statement concerning an applicant's citizenship status that is made on a registration form submitted to election authorities can involve a violation of the NVRA's registration fraud statute. Such violations are felonies subject to imprisonment for up to five years.

For jurisdictional purposes, the statute requires that the fraud be in connection with a federal election. As discussed above, voter registration in every state is unitary, in the sense that an individual registers to vote only once for all elective offices, local, state, and federal. Thus the jurisdictional element of section 1973gg-10(2) is satisfied whenever a false statement concerning citizenship status is made on a voter registration form.

Section 1973gg-10(2) is a specific intent offense. This means that the offender must have been aware that citizenship is a requirement for voting and that the registrant did not possess United States citizenship. In most instances, proof of the first element is relatively easy because the citizenship requirement is stated on the voter registration form, and the form requires that the voter check a box indicating that he or she is a citizen. Proof of the second element, however, may be more problematic, since the technicalities of acquiring United States citizenship may not have existed in the culture of the registrant's country of birth, or otherwise been evident to

him, and because the registrant may have received bad advice concerning the citizenship requirement. These issues can also usually be overcome by the fact that all voter registration forms now require a registrant to certify that he or she is a citizen.

**b) Naturalization, citizenship, or alien registry:
18 U.S.C. § 1015(f)**

Section 1015(f) was enacted in 1996 to provide an additional criminal prohibition addressing the participation of noncitizens in the voting process. This statute makes it an offense for an individual to make any false statement or claim that he or she is a citizen of the United States in order to register, or to vote. Unlike all other statutes addressing alien voting, section 1015(f) expressly applies to all elections -- federal, state, and local -- as well as to initiatives, recalls, and referenda.

Jurisdictionally, section 1015(f) rests on Congress's power over nationality (art. I, § 8, cl. 3), rather than on the Election Clause (art. I, § 4, cl. 1), which provides the basis for its broad reach.

Section 1015(f) is a specific intent offense and requires proof that the registrant or voter, or the person assisting the registrant or voter, be aware that citizenship is a prerequisite for registering or voting and that the registrant or voter does not possess United States citizenship.

Violations of section 1015(f) are felonies, punishable by imprisonment for up to five years.

c) Citizen of the United States: 18 U.S.C. § 911

Section 911 prohibits the knowing and willful false assertion of United States citizenship by a noncitizen. See, e.g., *United States v. Franklin*, 188 F.2d 182 (7th Cir. 1951); *Fotie v. United States*, 137 F.2d 831 (8th Cir. 1943). Violations of section 911 are punishable by imprisonment for up to three years.

As noted, all states require United States citizenship as a prerequisite for voting. However, historically, some states have not implemented the prerequisite through voter registration forms that clearly alerted prospective registrants that only citizens may vote. Under the NVRA, all states must now make this citizenship requirement clear, and prospective registrants must sign applications under penalty of perjury attesting that they meet this requirement. Therefore, falsely attesting to citizenship in any state is now more likely to be demonstrably willful, and therefore cognizable under section 911.

Section 911 requires proof that the offender was aware he was not a United States citizen, and that he was falsely claiming to be a citizen on a voter registration form. Violations of section 911 are felonies, punishable by up to three years' imprisonment.

d) Voting by aliens: 18 U.S.C. § 611

Section 611 is a relatively new statute that creates an additional crime for voting by persons who are not United States Citizens.

It applies to voting by non-citizens in an election where a federal candidate is on the ballot, except when: (1) non-citizens are authorized to vote by state or local law on non-federal candidates or issues, and (2) the ballot is formatted in a way that the non-citizen has the opportunity to vote solely for the non-federal candidate or issues on which he is entitled to vote under state law. Unlike section 1015(f), section 611 is directed at the act of voting, rather than the act of lying. But unlike section 1015(f), Section 611 is a strict liability offense in the sense that the prosecution must only prove that the defendant was not a citizen when he registered or voted.

Section 611 does not require proof that the offender be aware that citizenship is a prerequisite to voting.

Violations of section 611 are misdemeanors, punishable by up to one year imprisonment.

8. Travel Act: 18 U.S.C. § 1952

The Travel Act, 18 U.S.C. ' 1952, prohibits interstate travel, the interstate use of any other facility (such as a telephone), and any use of the mails to further specified "unlawful activity," including bribery in violation of state or federal law. Violations are punishable by imprisonment for up to five years. This statute is useful in election crime matters in that it applies to vote buying offenses that occur in states where vote-buying is a "bribery" offense, and it does so regardless of the type of election involved.

The predicate bribery under state law need not be common law bribery. The Travel Act applies as long as the conduct is classified as a "bribery" offense under applicable state law. *Perrin v. United States*, 444 U.S. 37 (1979). In addition, the Travel Act has been held to incorporate state crimes regardless of whether they are classified as felonies or misdemeanors. *United States v. Polizzi*, 500 F.2d 856, 873 (9th Cir. 1974), cert. denied, 419 U.S. 1120 (1975), *United States v. Karigiannis*, 430 F.2d 148, 150 (7th Cir.), cert. denied, 400 U.S. 904 (1970).

The first task in determining whether the Travel Act has potential application to a vote buying scheme is to examine the law of the state where the vote buying occurred to determine if it either: (1) is classified as a bribery offense, or (2) describes the offense of paying voters for voting in a way that requires proof of a quid pro quo, i.e., that a voter be paid in consideration for his or her vote for one or more candidates. If the state offense meets either of these criteria, the Travel Act potentially applies.

In the past, Travel Act prosecutions have customarily rested on predicate acts of interstate travel or the use of interstate facilities. Since election fraud is a local crime, interstate predicate acts are rarely present, and the Travel Act has not been used to prosecute election crime. However, in *United States v. Riccardelli*, 794 F.2d 829 (2d Cir. 1986), the Act's mail predicate was held to be satisfied by proof of an intrastate mailing. In reaching this conclusion, the Court conducted an exhaustive analysis of the Travel Act's legislative history and Congress's authority to regulate the mails. The Sixth Circuit subsequently reached a contrary result, holding that the Travel Act's mail predicate required an interstate mailing. *United States v. Barry*, 888 F.2d 1092 (6th Cir. 1989). In 1990 Congress resolved this conflict by adopting the *Riccardelli* holding in an amendment to the Travel Act, expressly extending federal jurisdiction to any use of the mails in furtherance of a state predicate offense.

Thus, the Travel Act should be considered as a vehicle to prosecute vote buying schemes in which the mails were used in those states where vote buying is statutorily defined as bribery. This theory is one of the few available which do not require a federal candidate on the ballot.

As with the mail fraud statute, each use of the mails in the furtherance of the bribery scheme is a separate offense. *United States v. Jabara*, 644 F.2d 574 (6th Cir. 1981). The defendant need not actually have done the mailing, so long as it was a reasonably foreseeable consequence of his or her activities. *United States v. Kelly*, 395 F.2d 727 (2d Cir.), cert. denied, 393 U.S. 963 (1968). Nor need the mailing have in itself constituted the illegal activity, as long as it promoted it in some way. *United States v. Bagnariol*, 665 F.2d 877 (9th Cir. 1981), cert. denied, 456 U.S. 962 (1982); *United States v. Barbieri*, 614 F.2d 715 (10th Cir. 1980); *United States v. Peskin*, 527 F.2d 71 (7th Cir. 1975), cert. denied, 429 U.S. 818 (1976); *United States v. Wechsler*, 392 F.2d 344 (4th Cir.), cert. denied, 392 U.S. 932 (1968).

An unusual feature of the Travel Act is that it requires an overt act subsequent to the jurisdictional event charged in the indictment. Thus, if a Travel Act charge is predicated on a use of the mails, the government

must allege and prove that the defendant or his or her agent subsequently acted to further the underlying unlawful activity. The subsequent overt act need not be unlawful in itself; this element has been generally held to be satisfied by the commission of a legal act as long as the act facilitated the unlawful activity. See, e.g., *United States v. Davis*, 780 F.2d 838 (10th Cir. 1985).

The Travel Act is particularly useful in voter bribery cases in non-federal elections that involve the mailing of absentee ballot materials. Such matters usually involve a defendant who offers voters compensation for voting, followed by the voter applying for, obtaining, and ultimately casting an absentee ballot. Each voting transaction can involve as many as four separate mailings: when the absentee ballot application is sent to the voter, when the completed application is sent to the local election board, when the absentee ballot is sent to the voter, and when the voter sends the completed ballot back to the election authority for tabulation.

The mailing must be in furtherance of the scheme. Therefore, care should be taken to ensure that the voting transaction in question was corrupted by a bribe before the mailing charged. If, for example, the voter was not led to believe that he or she would be paid for voting until after applying for, and receiving, an absentee ballot package, then the only mailing affected by bribery would be the transmission of the ballot package to the election authority; the Travel Act charge would have to be predicated on this final mailing, with some other subsequent overt act charged.

9. Mail and Wire Fraud: 18 U.S.C. §§ 1341 and 1343

The federal mail fraud statute prohibits use of the United States mails, or a private or commercial interstate carrier, to further a "scheme or artifice to defraud." 18 U.S.C. § 1341.21 Violations are punishable by imprisonment for up to five years.

At present, the most viable means of addressing election crime under the mail fraud statute is the "salary theory." Under this approach, the pecuniary benefits of elective office are charged as the object of the scheme.

a) Background

Until *McNally v. United States*, 483 U.S. 350 (1987), the mail fraud statute was frequently and successfully used to attain federal jurisdiction over schemes to corrupt local elections. Because its jurisdictional basis is the broad power of Congress to regulate the mails, section 1341 was used to address corruption of the voting process in purely local or state elections. See *Badders v. United States*, 240 U.S. 391, 392 (1916) (overt act of putting a letter in a United States post office is a matter Congress may regulate).

Courts had broadly interpreted the "scheme to defraud" element of section 1341 to include nearly any effort to procure, cast, or tabulate ballots illegal under state law. The theory was that citizens were entitled to fair and honest elections, and a scheme to corrupt an election defrauded them of this right. *United States v. Girdner*, 754 F.2d 877, 880 (10th Cir. 1985) (scheme to cast votes for ineligible voters); *United States v. Clapps*, 732 F.2d 1148, 1152-53 (3d Cir.) (scheme to usurp absentee ballots of elderly voters), cert. denied, 469 U.S. 1085 (1984); *United States v. States*, 488 F.2d 761, 766 (8th Cir. 1973) (scheme to submit fraudulent absentee ballots), cert. denied, 417 U.S. 909 (1974). The mail fraud statute was even held to reach schemes to deprive the public of information required under state campaign finance disclosure statutes. *United States v. Buckley*, 689 F.2d 893, 897-98 (9th Cir. 1982), cert. denied, 460 U.S. 1086 (1983); *United States v. Curry*, 681 F.2d 406, 411 (5th Cir. 1982).

21 The federal wire fraud statute, 18 U.S.C. § 1343, is essentially identical to the mail fraud statute, except for its jurisdictional element. Accordingly it also has potential application to election fraud schemes that are furthered by interstate wires.

The jurisdictional mailing requirement of section 1341, moreover, usually posed no substantial obstacle in election fraud cases. The Second Circuit may have adopted the most expansive position, holding in an unpublished opinion that the mail fraud statute applied to any fraudulent election practice resulting in postal delivery of a certificate of election to the winning candidate. See *Ingber v. Enzor*, 664 F. Supp. 814, 815-16 (S.D.N.Y. 1987) (habeas opinion quoting Second Circuit's opinion on direct appeal), *aff'd* on other grounds, 841 F.2d 450 (2d Cir. 1988). See also *United States v. Gordon*, 817 F.2d 1538 (11th Cir. 1987) (mailing the certificate of election to the winning candidate held to be in the furtherance of an election fraud scheme to elect that candidate). As most states mail such notices to victorious candidates, this theory would have allowed federal jurisdiction over election fraud by victorious politicians, both federal and nonfederal.

However, in *McNally*, the Supreme Court substantially restricted the utility of the mail fraud statute to combat election crimes. *McNally* held that "scheme to defraud" does not encompass schemes to deprive the public of intangible rights, such as the rights to good government and fair elections, but is limited to schemes to deprive others of property rights.

In 1988, Congress enacted the so-called "McNally-fix" statute, 18 U.S.C. § 1346, the purpose of which was to restore the pre-*McNally* scope of the mail fraud statute. Unfortunately, by its express terms, section 1346 only applies to schemes to deprive another of the "intangible right of honest services," a concept that does not embrace a scheme to defraud the public of a fair election or information required to be disclosed under federal or state campaign financing laws.

Nevertheless, *McNally* does not entirely foreclose use of the mail fraud statute to address election fraud. If a pecuniary interest -- such as money or salary -- is sought through the scheme, the mail fraud statute still applies. See *McNally*, 483 U.S. at 360 (noting that the jury was not charged on a money or property theory).

b) Salary theory of Mail and Wire Fraud

Schemes to obtain salaried positions by falsely representing one's credentials to a hiring authority remain prosecutable under the mail fraud statute after *McNally*. The objective of such "salary schemes" is to obtain pecuniary things by fraud; such schemes are therefore clearly within the scope of the common law concepts of fraud to which *McNally* sought to restrict the mail fraud statute. See *United States v. Granberry*, 908 F.2d 278, 280 (8th Cir. 1990) (scheme to obtain employment by falsifying application cognizable under salary theory); *cert. denied*, 500 U.S. 921 (1991); *United States v. Doherty*, 867 F.2d 47, 54-57 (1st Cir. 1989) (scheme to rig police promotion exam cognizable on salary theory); *United States v. Walters*, 711 F. Supp. 1435, 1442-46 (N.D. Ill. 1989) (scheme to obtain scholarships through false information), *rev'd* on other grounds, 913 F.2d 388 (7th Cir. 1990); *United States v. Ferrara*, 701 F. Supp. 39 (E.D.N.Y.) (scheme to obtain hospital salaries by falsifying medical training), *aff'd*, 868 F.2d 1268 (2d Cir. 1988); *United States v. Thomas*, 686 F. Supp. 1078, 1083-85 (M.D. Pa.) (scheme to rig police entrance exam), *aff'd*, 866 F.2d 1414 (3d Cir. 1988) (table), *cert. denied*, 490 U.S. 1048 (1989); *United States v. Cooper*, 677 F. Supp. 778, 781-82 (D. Del. 1988) (wire fraud scheme to obtain pay for person not performing work).²²

This theory of post-*McNally* mail fraud has potential application to some election fraud schemes, since most elected offices in the United States carry with them a salary and various emoluments that have monetary value. The criterion by which candidates for elected positions are selected by the public is who obtained the most valid

²² Another district court has upheld application of section 1341 to a commercial bribery scheme to pay salary to a dishonest procurement officer. *United States v. Johns*, 742 F. Supp. 196, 204-06, 212-13 (E.D. Pa. 1990) (collecting cases in an extended discussion of the salary theory). The Third Circuit, however, reversed *Johns'* mail fraud convictions with a cursory, unpublished order that held, enigmatically, that the "convictions for mail fraud must be reversed inasmuch as the evidence was insufficient, as a matter of law, to establish that appellant had defrauded his employer of money paid to him as salary." *United States v. Johns*, 972 F.2d 1333 (3d Cir. 1991) (table) (available at 1991 U.S. App. LEXIS 18586).

votes. Thus, schemes to obtain salaried elected positions through procuring and tabulating invalid ballots are capable of being charged as traditional common law frauds: that is, schemes to obtain the salary of the office in question by concealing material facts about the critical issue of which candidate received the most valid votes. In addition, election fraud schemes can present related issues concerning the quality and value of the public officer hired thereby. The Supreme Court observed in *McNally* that deceit concerning the quality and value of a commodity or service remains within the scope of the mail fraud statute:

We note that as the action comes to us, there was no charge and that the jury was not required to find that the Commonwealth itself was defrauded of any money or property. It was not charged that in the absence of the alleged scheme the Commonwealth would have paid a lower premium or secured better insurance.

483 U.S. at 360 (emphasis added). Election fraud schemes involve an aspect of material concealment insofar as the "value" of the services the public is paying for are concerned: the public "hired" the candidate it was falsely led to believe received the most valid votes, and consequently received services of lower value.

The "salary theory" of post-*McNally* mail fraud has been applied to election frauds in only a few cases to date, most notably *Ingber v. Enzor*, 841 F.2d 450 (2d Cir. 1988) (post-*McNally* habeas relief appropriate for pre-*McNally* mail fraud defendant convicted of securing election to salaried township position through illegal ballots, where reviewing court could not determine whether jury's verdict rested on "salary theory" or on alternative intangible rights theory of the case); and *United States v. Webb*, 689 F. Supp. 703 (W.D. Ky. 1988) (tax dollars paid to a public official elected by fraud are a loss to the citizens, who did not receive the benefit of the bargain). This theory of mail fraud therefore remains a viable option by which prosecutors can attain federal jurisdiction over frauds that occur in nonfederal elections which employ the mails.

In *United States v. Schermerhorn*, 713 F. Supp. 88 (S.D.N.Y. 1989), aff'd, 906 F.2d 66 (2d Cir. 1990), the salary theory of mail fraud was held to apply to a scheme to violate state campaign financing laws. The facts of the case were egregious: a candidate for the State Senate whose campaign was largely funded by organized crime and who failed to disclose that fact on state campaign financing disclosure forms that were required to be filed by state law. The district judge held that such a concealment resulted in the electorate being misled, and the candidate was thereby able to obtain the office he sought and its salary from a deceived electorate. This district court decision has been advanced as authority for the proposition that violations of state campaign financing laws by candidates seeking state or local office can be federalized and prosecuted under the 18 U.S.C. § 1341. This theory has some support in the *Schermerhorn* case. However, prosecutors should be cautious in applying this theory and consider using it only when the facts that are not disclosed under state or local campaign financing laws would have had a clear and direct impact on voting behavior had the truth been properly reported.

c) "Honest services" frauds: 18 U.S.C. § 1346

As summarized above, prior to *McNally* nearly all of the Circuits had held that a scheme to defraud the public of a fair and impartial election was one of the "intangible rights" schemes to defraud that was reached by the mail and wire fraud statutes. *McNally* repudiated this theory in an opinion that not only rejected the intangible rights theory of mail and wire fraud, but did so by citing several election fraud cases as examples of the kinds of fraud the Court found outside these criminal laws.

The following year, Congress enacted 18 U.S.C. § 1346 for the express purpose of legislatively reversing *McNally* in order to restore sections 1341 and 1343 to the status they enjoyed prior to that decision. However, the language Congress used to achieve this objective did not clearly restore the use of these statutes to election frauds. This is because section 1346 is limited to schemes to deprive a victim of the "intangible right to honest services," and election frauds do not appear to involve such an objective. Moreover, jurisprudence in the arena of public corruption has generally confined section 1346 to schemes involving traditional forms of corruption that involve a clear breach of a fiduciary duty of "honest services" owed by a public official to the body politic: e.g., bribery, extortion, embezzlement, theft, conflicts of interest, and, in some instances, gratuities. See, e.g.,

United States v. Panarella, 277 F.3d 678 (3d Cir. 2002); United States v. Sawyer, 329 F.3d 31 (1st Cir. 2001); United States v. Bloom, 149 F.3d 649 (7th Cir. 1998); United States v. Brumley, 116 F.3d 728 (5th Cir. 1997)(en banc).

Thus, section 1346 did not restore mail and wire fraud jurisdiction to schemes to "defraud the public of a fair and impartial election," and it is the Criminal Division's position that section 1346 does not apply to schemes to corrupt elections

d) "Cost-of-election" theory of 18 U.S.C. §§ 1341 and 1343

One case, United States v. DeFries, 43 F.3d 707 (D.C. Cir. 1995), held that a scheme to cast invalid ballots in a labor union election which had the effect of tainting the election to a point that exposed it to being declared invalid involved, among other things, a scheme to defraud the election authority charged with running the election of the costs involved.

DeFries was not a traditional election fraud prosecution. Rather, it involved corruption of a union election where supporters for one candidate for union office cast fraudulent ballots for the candidate they supported. When the scheme was uncovered, the United States Department of Labor ordered that a new election be held, thereby causing the union to incur an actual pecuniary loss. The D.C. Circuit held that the relationship between that pecuniary loss and the voter fraud scheme was sufficient to satisfy the requirements of McNally.

This theory of prosecution has potential validity primarily where the mail and wire fraud statutes are needed to federalize voter frauds involving the counting of illegal ballots in nonfederal elections, particularly where the fraud has led to a successful election contest and the election authority has been ordered to hold a new election and thereby incur additional costs.

10. Troops at polls: 18 U.S.C. § 592

This statute makes it unlawful to station troops or "armed men" at the polls in a general or special election (but not a primary), except when necessary "to repel armed enemies of the United States." Violations are punishable by imprisonment for up to five years and disqualification from any federal office.

Section 592 prohibits the use of official authority to order armed personnel to the polls; it does not reach the troops who actually go in response to those orders. The effect of this statute is to prohibit FBI agents from conducting investigations within the polls on election day, and United States Marshals from being stationed at open polls. This is because FBI agents and Marshals must be armed while on duty.

This statute applies only to agents of the United States government. It does not prohibit state or local law enforcement agencies from sending police officers to quell disturbances at polling places, nor does it preempt state laws that require police officers to be stationed in polling places.

11. Campaign dirty tricks

Two federal statutes - both of which are part of the Federal Election Campaign Act (FECA) specifically address campaign tactics and practices: 2 U.S.C. " 441d and 441h. As is the case with all other features of FECA, violations of these two statutes are subject to both civil and criminal penalties, 2 U.S.C. §§ 437g(a) and (d) respectively. These penalties will be discussed in Chapter Six.

Section 441d provides that whenever a person or political committee makes certain types of election-related disbursements, an expenditure for the purpose of financing a public communication advocating the election or

defeat of a clearly identified federal candidate, or a solicitation for the purpose of influencing the election of a federal candidate, the communication must contain an attribution clause identifying the candidate, committee, or person who authorized and/or paid for the communication. The content of the attribution, as well as its size and location in the advertisement are described in the statute.

Section 441h prohibits fraudulently representing one's authority to speak for a federal candidate. As a result of the 2002 Bipartisan Campaign Reform Act, the provision contains two specific prohibitions:

- a) Section 441h(a) forbids a federal candidate or an agent of a federal candidate from misrepresenting his or her authority to speak, write, or otherwise act for any other federal candidate or political party on a matter which is damaging to that other candidate or political party. For example, section 441h(a) would prohibit an agent of federal candidate A from issuing a statement that was purportedly written by federal candidate B and which concerned a matter which was damaging to candidate B.
- b) Section 441h(b) forbids any person from fraudulently representing his or her authority to solicit contributions on behalf of a federal candidate. This provision was added by BCRA and became effective on November 6, 2002. For example, this provision would prohibit any person from raising money by claiming that he or she represented federal candidate A when in fact the person had no such authority.

12. Retention of federal election records: 42 U.S.C. § 1974

The detection, investigation, and proof of election crimes --and in many instances Voting Rights Act violations -- often depends on documentation generated during the voter registration, voting, tabulation, and election certification processes. In recognition of this fact, and the length of time it can take for credible election fraud predication to develop, Congress enacted Section 1974 to require that documentation generated in connection with the voting and registration process be retained for 22 months if it pertained to an election that included a federal candidate. Absent this statute, the disposition of election documentation would be subject solely to state law, which in virtually all states permits its destruction within a few months after the election is certified.

Section 1974 provides for criminal misdemeanor penalties for any election administrator who knowingly and willfully fails to retain, or willfully steals, destroys, or conceals, records covered by the statute. 42 U.S.C. § 1974a.²³ More importantly, the reach of this statute qualitatively to specific categories of election documentation is critical to prosecutors as well as election administrators, who must often resolve election disputes and answer challenges to the fairness of elections.²⁴

For this reason, a detailed discussion of section 1974 and its application to particular types of election documentation generated in the current age of electronic voting will be presented here.

a) Legislative purpose and background

The voting process generates voluminous documents and records, ranging from voter registration forms and absentee ballot applications to ballots and tally reports. If election fraud occurs, these records often play an important role in the detection and prosecution of the crime. Documentation generated by the election process also plays an equally important role in the detection, investigation and proof of federal civil rights violations.

²³ Specifically, Section 1974a provides that any election administrator or document custodian who willfully fails to comply with the statute is subject to imprisonment for up to one year.

²⁴ Indeed, the federal courts have recognized that the purpose of this federal document retention requirement is to protect the right to vote by facilitating the investigation of illegal election practices. *Kennedy v. Lynd*, 306 F.2d 222 (5th Cir. 1962), *cert. denied*, 371 U.S. 952 (1963).

State laws generally require that voting documents be retained for sixty to ninety days. Those relatively brief periods are usually insufficient to make certain that voting records will be preserved until more subtle forms of federal civil rights abuses and election crimes have been detected.

In 1960, Congress enacted a federal requirement that extended the document retention period for elections where federal candidates were on the ballot to twenty-two months after the election. Pub. L. 86-449, Title III, § 301, 74 Stat. 88; 42 U.S.C. §§ 1974-1974e. This election documentation retention requirement is backed-up with criminal misdemeanor penalties that apply to election officers and document custodians who willfully destroy covered election records before the expiration of the 22-month federal retention period.

The retention requirements of section 1974 are aimed specifically at election administrators. In a parochial sense, these laws place criminally sanctionable duties on election officials. However, in a broader sense this federal retention law assists election administrators perform more efficiently the tasks of managing elections, and determining winners of elective contests. It does this by requiring election managers to focus appropriate attention on the types of election records under their supervision and control that may be needed to resolve challenges to the election process, and by requiring that they take appropriate steps to insure that those records will be preserved intact until such time as they may become needed to resolve legitimate questions that frequently arise involving the election process. In this way, section 1974 serves the election administrators by better equipping them to respond to legitimate questions concerning the voting process when they arise.

b) The basic requirements of section 1974

Section 1974 requires that election administrators preserve for twenty-two months "all records and papers which come into their possession relating to any application, registration, payment of poll tax, or other act requisite to voting." This retention requirement applies to all elections in which a candidate for federal office was on the ballot, that is, a candidate for the United States Senate, the United States House of Representatives, President or Vice President of the United States, or presidential elector. Section 1974 does not apply to records generated in connection with purely local or state elections.

Retention and disposition of records in purely nonfederal elections (those where no federal candidates were on the ballot) are governed by state document retention laws.

However, section 1974 does apply to all records generated in connection with the process of registering voters and maintaining current electoral rolls. This is because voter registration in virtually all United States jurisdictions is "unitary," in the sense that a potential voter registers only once to become eligible to vote for both local and federal candidates. See *United States v. Ciancuilli*, 482 F.Supp. 585 (E.D.Pa. 1979). Thus, registration records must be preserved as long as the voter registration to which they pertain is considered an "active" one under local law and practice, and those records cannot be disposed of until the expiration of 22 months following the date on which the registration ceased to be "active."

This statute must be interpreted in keeping with its congressional objective: Under section 1974, all documents and records that may be relevant to the detection or prosecution of federal civil rights or election crimes must be maintained if the documents or records were generated in connection with an election which included one or more federal candidates.

c) Section 1974 requires document preservation, not document generation

Section 1974 does not require that states or localities produce records in the course of their election processes. However, if a state or locality chooses to create a record that pertains to voting, this statute requires that documentation to be retained if it pertains to voting in an election covered by the statute.

d) Originals must be retained

Section 1974 further requires that the original documents be maintained, even in those jurisdictions that have the capability to reduce original records to digitized replicas. This is because handwriting analysis cannot at present be performed on digitized reproductions of signatures, and because the legislative purpose advanced by this statute is to preserve election records for their evidentiary value in criminal and civil rights lawsuits. Therefore, in states and localities that employ new digitization technology to archive election forms that were

originally manually subscribed by voters, Section 1974 requires that the originals be maintained for the requisite 22-month period.

e) Election officials must supervise storage

Section 1974 requires that covered election documentation be retained either physically by election officials themselves, or under the direct administrative supervision of election officers. This is because the document retention requirements of this federal law place the retention and safe-keeping duties squarely on the shoulders of election officers, and Section 1974 does not contemplate that this responsibility be shifted to other government agencies or officers.

An electoral jurisdiction may validly determine that election records subject to section 1974 would most efficiently be kept under the physical supervision of government officers other than election officers (e.g., motor vehicle departments, social service administrators). This is particularly likely to occur following the enactment of the NVRA, which for the first time in many states gives government agencies other than election administrators a substantive role in the voter registration process.

If an electoral jurisdiction makes such a determination, section 1974 requires that administrative procedures be in place giving election officers ultimate management authority over the retention and security of those election records. Those administrative procedures should insure that election officers retain ultimate responsibility for the retention and security of covered election documents and records, and that election officers retain the right to physically access and dispose of them.

f) Retention not required for certain records

Section 1974 does not apply to surplus voting materials that are not used in elections where federal candidates were on the ballot. Examples of such surplus materials include unused ballots and forms, inventories of supplies, payroll and personnel records pertaining to the hiring, training or payment of election officials, and other documents that do not reflect or embody a step in the registration or the voting process. Section 1974 only requires the retention of documentation that results in, or which reflects, an act of registering to vote or voting, or a step in the vote tabulation and election certification process.

Documentation generated in the course of elections held solely for local or state candidates, or bond issues, initiatives, referenda and the like, is not covered by Section 1974 and may be disposed of within the usually shorter time periods provided under state election laws. However, if there is a federal candidate on the ballot in the election, the 22-month federal retention requirement applies.

g) Retention under Section 1974 versus retention under the National Voter Registration Act

The retention requirements of section 1974 interface significantly with somewhat similar retention requirements of the National Voter Registration Act, 42 U.S.C. § 1973gg-6(i).

There differences between these two provisions are threefold:

First, section 1974 applies to all records generated by the election process, while section 1973gg-6(i) applies only to registration records generated under the NVRA.

Second, section 1974 requires only that records subject to its terms be retained intact for the requisite 22-month period, while section 1973gg-6(i) requires that registration records be both retained and -- with certain specifically noted exceptions -- be made available to the public for inspection for 24 months.

Third, violations of section 1974 by election administrators are subject to criminal sanctions, while violations of section 1973gg-6(i) are subject only to noncriminal remedies.

E. CONCLUDING COMMENTS: WHY PROSECUTING ELECTION CRIMES IS IMPORTANT

I conclude this paper with an editorial of March 19, 2004, in the Big Sandy News of Eastern Kentucky concerning a recent series of vote buying prosecutions in a rural jurisdiction in the Appalachian Mountains of Eastern Kentucky. The editorial comments on the sentencing of the County Judge-Executive of Knott County and a campaign worker for vote buying. It appears here with the permission of the Big Sandy News, whose late Publisher and Editor, Scott Perry, as an Eastern Kentucky newspaper man, led a strong charge against public corruption and took a proactive role in the fight.

In Kentucky, county judge-executives are the chief operating officers of county government, and, as such, occupy a position of substantial power. Judge Donnie Newsome's conviction culminated a series of vote buying cases the Public Integrity Section and the United States Attorney's Office for the Eastern District of Kentucky jointly prosecuted during 2003 and early 2004 that arose out of a scheme to pay voters for voting in the 1998 primary. This series of cases ultimately resulted in the indictment of 16 defendants. Twelve of these defendants were convicted, three defendants were acquitted, and one defendant's case was dismissed. The highlight of this series of election fraud cases was the conviction of Knott County Judge-Executive Donnie Newsome for for vote buying in violation of 42 U.S.C. § 1973i©. Thereafter, the defendant cooperated with the prosecution and received a sentence reduction recommendation under U.S.S.G. §5K1.1. On March 16, 2004, he was sentenced to serve 26 months in prison.²⁵

²⁵ The sentencing judge indicated that had it not been for the downward departure recommended by the prosecution, he was prepared to sentence Newsome to five years' imprisonment.

The following editorial, reprinted here in its entirety, presents an eloquent yet concise statement of why the investigation and prosecution of electoral corruption are important law enforcement priorities of the Justice Department.

Vote fraud sentencing sad, encouraging
-- by Susan Allen

Tuesday's sentencing in federal court of Knott County Judge-Executive Donnie Newsome and campaign worker Willard Smith on vote buying charges was both a sad and encouraging day for Eastern Kentucky.

Sad the people of Knott County were effectively robbed of their voting rights by Newsome and others doling out cash to buy a public office.

Sad that, as Federal Judge Danny C. Reeves pointed out, some people in Knott and other counties think that elections are supposed to be bought and the only reason to go to the polls is to get their pay off.

Sad those seeking public office in Knott County, and most assuredly in other counties, target poor, handicapped, addicted and uneducated voters to carry out their scheme to secure public office and a hefty paycheck.

Sad that voters in Knott and other counties have been reduced by years and years of political corruption to truly believing that selling their vote is not wrong, it's the norm.

Sad that Eastern Kentuckians have pretty much been left to the mercy of the political machines which serve as dictators of their lives, from their home towns all the way to Frankfort.

Sad that generations sacrificed their lives and their children's lives to the political bosses for mere bones from their local leaders while now their kids are dying from drug overdoses which, we strongly suspect, are directly tied to the years of iniquity and demoralization.

Sad that even today some elected officials continue the abuse and either refuse or can't comprehend the impact of their past and current atrocities against their own people.

Sad that Judge Reeves could see and completely understand during just a one week trial the utter hopelessness and apathy in the area people feel regarding the so-called democratic process.

Sad that our state lawmakers have piddled away their time during this legislative session on petty political issues without even proposing laws that would bar convicted felons, especially vote buyers from retaining their offices while appealing their verdicts.

Sad that Donnie Newsome continues to rule Knott County from a jail cell.

Tuesday's events were encouraging in that prosecutors (AUSA E.D. Ky.) Tom Self and (Public Integrity Section Trial Attorney) Richard Pilger were willing to fight the hard battle for the people of Knott County, which hopefully will lead to at least a grassroots effort for people to take back their towns.

Encouraging that some light has been shed on the workings of the dark political underworld which might shock the good people of Eastern Kentucky into action, at least for their children's future.

Encouraging that what might be perceived as a baby step with Newsome's conviction could finally lead to that giant step Eastern Kentuckians must surely be ready to take to recapture control of their own destinies.

Encouraging that federal authorities have pledged to continue the fight they have started to restore to the people the right to

govern themselves without dealing with a stacked deck.

Encouraging that Judge Reeves and prosecutors did see that the Knott Countlans who sold their votes, in some cases for food, were victims of Newsome's plot and didn't need to be punished further.

Encouraging that there's some branch of government, in this case on the federal level, not shy about taking on political power houses, knowing the obstacles in their way will be many.

Encouraging that Newsome's lips have loosened regarding others involved in similar schemes to buy public office, even though we suspect it has nothing to do with righting the wrongs, only a self-serving move to spend less days behind bars.

Encouraging that maybe, for once, we are not in this fight alone and have a place to turn to for help when we are willing to stand up to the machine.

The feds have helped us take that first step toward getting back what is rightfully ours which has been traded away by others in the past in back room deals. Not only do they need our help, they need our help.

This time, let's not let ourselves down.

APPENDIX -- STATUTORY TEXTS

The following are the actual statutory texts of the criminal laws referred to in the foregoing paper:

1. EXCERPTS FROM TITLE 18, UNITED STATES CODE

§ 241. Conspiracy against rights

If two or more persons conspire to injure, oppress, threaten, or intimidate any person in any State, Territory, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; ...

They shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section they shall be fined under this title or imprisoned for any term of years or for life, or both.

§ 242. Deprivation of rights under color of law

Whoever, under color of law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section imprisoned for any term of years or for life, or both.

§ 245. Federally protected activities

(a)(1) Nothing in this section shall be construed as indicating an intent on the part of Congress to prevent any State, any possession or Commonwealth of the United States, or the District of Columbia, from exercising jurisdiction over any offense over which it would have jurisdiction in the absence of this section, nor shall anything in this section be construed as depriving State and local law enforcement authorities of responsibility for prosecuting acts that may be violations of this section and that are violations of State and local law. No prosecution of any offense described in this section shall be undertaken by the United States except upon the certification in writing of the Attorney General, the Deputy Attorney General, the Associate Attorney General, or any Assistant Attorney General specially designated by the Attorney General that in his judgment a prosecution by the United States is in the public interest and necessary to secure substantial justice, which function of certification may not be delegated.

(2) Nothing in this subsection shall be construed to limit the authority of Federal officers, a Federal grand jury, to investigate possible violations of this section.

(b) Whoever, whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with--

(1) any person because he is or has been, or in order to intimidate such person or any other person or any class of persons from--

(A) voting or qualifying to vote, qualifying or campaigning as a candidate for elective office, or qualifying or acting as a poll watcher, or any legally authorized election official, in any

primary, special, or general election;

* * * * *

shall be fined under this title, or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section shall be fined under this title or imprisoned for any term of years or for life, or both.

* * * * *

§ 592. Troops at polls

Whoever, being an officer of the Army or Navy, or other person in the civil, military, or naval service of the United States, orders, brings, keeps, or has under his authority or control any troops or armed men at any place where a general or special election is held, unless such force be necessary to repel armed enemies of the United States, shall be fined not more than \$5,000 or imprisoned not more than five years, or both; and be disqualified from holding any office of honor, profit, or trust under the United States.

This section shall not prevent any officer or member of the armed forces of the United States from exercising the right of suffrage in any election district to which he may belong, if otherwise qualified according to the laws of the State in which he offers to vote.

§ 593. Interference by armed forces

Whoever, being an officer or member of the Armed Forces of the United States, prescribes or fixes or attempts to prescribe or fix, whether by proclamation, order or otherwise, the qualifications of voters at any election in any State; or

Whoever, being such officer or member, prevents or attempts to prevent by force, threat, intimidation, advice or otherwise any qualified voter of any State from fully exercising the right of suffrage at any general or special election; or

Whoever, being such officer or member, orders or compels or attempts to compel any election officer in any State to receive a vote from a person not legally qualified to vote; or

Whoever, being such officer or member, imposes or attempts to impose any regulations for conducting any general or special election in a State, different from those prescribed by law; or

Whoever, being such officer or member, interferes in any manner with an election officer's discharge of his duties--

Shall be fined not more than \$5,000 or imprisoned not more than five years, or both; and disqualified from holding any office of honor, profit or trust under the United States.

This section shall not prevent any officer or member of the Armed Forces from exercising the right of suffrage in any district to which he may belong, if otherwise qualified according to the laws of the State of such district.

§ 594. Intimidation of voters

Whoever intimidates, threatens, coerces, or attempts to intimidate, threaten, or coerce, any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose, or of causing such other person to vote for or not to vote for, any candidate for the office of President, Vice President, Presidential elector, Member of the Senate, Member of the House of Representatives, Delegate from the District of Columbia, or Resident Commissioner, at any election held solely or in part for the purpose of electing such candidate, shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

§ 595. Interference by administrative employees of Federal, State, or Territorial Governments

Whoever, being a person employed in any administrative position by the United States, or by any department or agency thereof, or by the District of Columbia or any agency or instrumentality thereof, or by any State, Territory, or Possession of the United States, or any political subdivision, municipality, or agency thereof, or agency of such political subdivision or municipality (including any corporation owned or controlled by any State, Territory, or Possession of the United States or by any such political subdivision, municipality, or agency), in connection with any activity which is financed in whole or in part by loans or grants made by the United States, or any department or agency thereof, uses his official authority for the purpose of interfering with, or affecting, the nomination or the election of any candidate for the office of President, Vice President, Presidential elector, Member of the Senate, Member of the House of Representatives, Delegate from the District of Columbia, or Resident Commissioner, shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

This section shall not prohibit or make unlawful any act by any officer or employee of any educational or research institution, establishment, agency, or system which is supported in whole or in part by any state or political subdivision thereof, or by the District of Columbia or by any Territory or Possession of the United States; or by any recognized religious, philanthropic or cultural organization.

§ 596. Polling armed forces

Whoever, within or without the Armed Forces of the United States, polls any member of such forces, either within or without the United States, either before or after he executes any ballot under any Federal or State law, with reference to his choice of or his vote for any candidate, or states, publishes, or releases any result of any purported poll taken from or among the members of the Armed Forces of the United States or including within it the statement of choice for such candidate or of such votes cast by any member of the Armed Forces of the United States, shall be fined not more than \$1,000 or imprisoned for not more than one year, or both.

The word "poll" means any request for information, verbal or written, which by its language or form of expression requires or implies the necessity of an answer, where the request is made with the intent of compiling the result of the answers obtained, either for the personal use of the person making the request, or for the purpose of reporting the same to any other person, persons, political party, unincorporated association or corporation, or for the purpose of publishing the same orally, by radio, or in written or printed form.

§ 597. Expenditures to influence voting

Whoever makes or offers to make an expenditure to any person, either to vote or withhold his vote, or to vote for or against any candidate; and

Whoever solicits, accepts, or receives any such expenditure in consideration of his vote or the withholding of his vote--

Shall be fined not more than \$1,000 or imprisoned not more than one year, or both; and if the violation was willful, shall be fined not more than \$10,000 or imprisoned not more than two years, or both.

§ 598. Coercion by means of relief appropriations

Whoever uses any part of any appropriation made by Congress for work relief, relief, or for increasing employment by providing loans and grants for public- works projects, or exercises or administers any authority conferred by any Appropriation Act for the purpose of interfering with, restraining, or coercing any individual in the exercise of his right to vote at any election, shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

§ 599. Promise of appointment by candidate

Whoever, being a candidate, directly or indirectly promises or pledges the appointment, or the use of his influence or support for the appointment of any person to any public or private position or employment, for the purpose of procuring support in his candidacy shall be fined not more than \$1,000 or imprisoned not more than one year, or both; and if the violation was willful, shall be fined not more than \$10,000 or imprisoned not more than two years, or both.

§ 600. Promise of employment or other benefit for political activity

Whoever, directly or indirectly, promises any employment, position, compensation, contract, appointment, or other benefit, provided for or made possible in whole or in part by any Act of Congress, or any special consideration in obtaining any such benefit, to any person as consideration, favor, or reward for any political activity or for the support of or opposition to any candidate or any political party in connection with any general or special election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, shall be fined not more than \$10,000 or imprisoned not more than one year, or both.

§ 601. Deprivation of employment or other benefit for political contribution

(a) Whoever, directly or indirectly, knowingly causes or attempts to cause any person to make a contribution of a thing of value (including services) for the benefit of any candidate or any political party, by means of the denial or deprivation, or the threat of the denial or deprivation, of--

(1) any employment, position, or work in or for any agency or other entity of the Government of the United States, a State, or a political subdivision of a State, or any compensation or benefit of such employment, position, or work; or

(2) any payment or benefit of a program of the United States, a State, or a political subdivision of a State; if such employment, position, work, compensation, payment, or benefit is provided for or made possible in whole or in part by an Act of Congress, shall be fined not more than \$10,000, or imprisoned not more than one year, or both.

(b) As used in this section--

- (1) the term "candidate" means an individual who seeks nomination for election, or election, to Federal, State, or local office, whether or not such individual is elected, and, for purposes of this paragraph, an individual shall be deemed to seek nomination for election, or election, to Federal, State, or local office, if he has (A) taken the action necessary under the law of a State to qualify himself for nomination for election, or election, or (B) received contributions or made expenditures, or has given his consent for any other person to receive contributions or make expenditures, with a view to bringing about his nomination for election, or election, to such office;
- (2) the term "election" means (A) a general, special primary, or runoff election, (B) a convention or caucus of a political party held to nominate a candidate, (C) a primary election held for the selection of delegates to a nominating convention of a political party, (D) a primary election held for the expression of a preference for the nomination of persons for election to the office of President, and (E) the election of delegates to a constitutional convention for proposing amendments to the Constitution of the United States or of any State; and
- (3) the term "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States.

§ 602. Solicitation of political contributions

- (a) It shall be unlawful for--
 - (1) a candidate for the Congress;
 - (2) an individual elected to or serving in the office of Senator or Representative in, or Delegate or Resident Commissioner to, the Congress;
 - (3) an officer or employee of the United States or any department or agency thereof; or
 - (4) a person receiving any salary or compensation for services from money derived from the Treasury of the United States; to knowingly solicit any contribution within the meaning of section 301(8) of the Federal Election Campaign Act of 1971 from any other such officer, employee, or person. Any person who violates this section shall be fined under this title or imprisoned not more than 3 years, or both.
- (b) The prohibition in subsection (a) shall not apply to any activity of an employee (as defined in section 7322(1) of title 5) or any individual employed in or under the United States Postal Service or the Postal Rate Commission, unless that activity is prohibited by section 7323 or 7324 of such title.

§ 603. Making political contributions

- (a) It shall be unlawful for an officer or employee of the United States or any department or agency thereof, or a person receiving any salary or compensation for services from money derived from the Treasury of the United States, to make any contribution within the meaning of section 301(8) of the Federal Election Campaign Act of 1971 to any other such officer, employee or person or to any Senator or Representative in, or Delegate or Resident Commissioner to, the Congress, if the person receiving such contribution is the employer or employing authority of the person making the contribution. Any person who violates this section shall be fined not more than \$5,000 or imprisoned not more than three years, or both.
- (b) For purposes of this section, a contribution to an authorized committee as defined in section 302(e)(1) of the Federal Election Campaign Act of 1971 shall be considered a contribution to the individual who has authorized such committee.

(c) The prohibition in subsection (a) shall not apply to any activity of an employee (as defined in section 7322(1) of title 5) or any individual employed in or under the United States Postal Service or the Postal Rate Commission, unless that activity is prohibited by section 7323 or 7324 of such title.

§ 604. Solicitation from persons on relief

Whoever solicits or receives or is in any manner concerned in soliciting or receiving any assessment, subscription, or contribution for any political purpose from any person known by him to be entitled to, or receiving compensation, employment, or other benefit provided for or made possible by any Act of Congress appropriating funds for work relief or relief purposes, shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

§ 605. Disclosure of names of persons on relief

Whoever, for political purposes, furnishes or discloses any list or names of persons receiving compensation, employment or benefits provided for or made possible by any Act of Congress appropriating, or authorizing the appropriation of funds for work relief or relief purposes, to a political candidate, committee, campaign manager, or to any person for delivery to a political candidate, committee, or campaign manager; and

Whoever receives any such list or names for political purposes--

Shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

§ 606. Intimidation to secure political contributions

Whoever, being one of the officers or employees of the United States mentioned in section 602 of this title, discharges, or promotes, or degrades, or in any manner changes the official rank or compensation of any other officer or employee, or promises or threatens so to do, for giving or withholding or neglecting to make any contribution of money or other valuable thing for any political purpose, shall be fined not more than \$5,000 or imprisoned not more than three years, or both.

§ 607. Place of solicitation

(a) It shall be unlawful for any person to solicit or receive any contribution within the meaning of section 301(8) of the Federal Election Campaign Act of 1971 in any room or building occupied in the discharge of official duties by any person mentioned in section 603, or in any navy yard, fort, or arsenal. Any person who violates this section shall be fined not more than \$5,000 or imprisoned not more than three years, or both.

(b) The prohibition in subsection (a) shall not apply to the receipt of contributions by persons on the staff of a Senator or Representative in, or Delegate or Resident Commissioner to, the Congress, provided, that such contributions have not been solicited in any manner which directs the contributor to mail or deliver a contribution to any room, building, or other facility referred to in subsection (a), and provided that such contributions are transferred within seven days of receipt to a political committee within the meaning of section 302(e) of the Federal Election Campaign Act of 1971.

§ 608. Absent uniformed services voters and overseas voters

- (a) Whoever knowingly deprives or attempts to deprive any person of a right under the Uniformed and Overseas Citizens Absentee Voting Act shall be fined in accordance with this title or imprisoned not more than five years, or both.
- (b) Whoever knowingly gives false information for the purpose of establishing the eligibility of any person to register or vote under the Uniformed and Overseas Citizens Absentee Voting Act, or pays or offers to pay, or accepts payment for registering or voting under such Act shall be fined in accordance with this title or imprisoned not more than five years, or both.

§ 609. Use of military authority to influence vote of member of Armed Forces

Whoever, being a commissioned, noncommissioned, warrant, or petty officer of an Armed Force, uses military authority to influence the vote of a member of the Armed Forces or to require a member of the Armed Forces to march to a polling place, or attempts to do so, shall be fined in accordance with this title or imprisoned not more than five years, or both. Nothing in this section shall prohibit free discussion of political issues or candidates for public office.

§ 610. Coercion of political activity

It shall be unlawful for any person to intimidate, threaten, command, or coerce, or attempt to intimidate, threaten, command, or coerce, any employee of the Federal Government as defined in section 7322(1) of title 5, United States Code, to engage in, or not engage in, any political activity, including, but not limited to, voting or refusing to vote for any candidate or measure in any election, making or refusing to make any political contribution, or working or refusing to work on behalf of any candidate. Any person who violates this section shall be fined not more than \$5,000 or imprisoned not more than three years, or both.

§ 911. Citizen of the United States

Whoever falsely and willfully represents himself to be a citizen of the United States shall be fined not more than \$1,000 or imprisoned not more than three years, or both.

§ 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, [FN2] or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than \$1,000 or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both.

§ 1346. Definition of "scheme or artifice to defraud"

For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

§ 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises

- (a) Whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to--
 - (1) distribute the proceeds of any unlawful activity; or
 - (2) commit any crime of violence to further any unlawful activity; or
 - (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than \$10,000 or imprisoned for not more than five years, or both.
- (b) As used this section (i) "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States, or (3) any act which is indictable under subchapter II of chapter 53 of title 31, United States Code, or under section 1956 or 1957 of this title and (ii) the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.
- (c) Investigations of violations under this section involving liquor shall be conducted under the supervision of the Secretary of the Treasury.

2. EXCERPTS FROM TITLE 42, UNITED STATES CODE

§ 1973i. Prohibited acts:

False information in registering or voting; penalties

- (c) Whoever knowingly or willfully gives false information as to his name, address, or period of residence in the voting district for the purpose of establishing his eligibility to register or vote, or conspires with another individual for the purpose of encouraging his false registration to vote or illegal voting, or pays or offers to pay or accepts payment either for registration to vote or for voting shall be fined not more than \$10,000 or imprisoned not more than five years, or both: Provided, however, That this provision shall be applicable only to general, special, or primary elections held solely or in part for the purpose of selecting or electing any candidate for the office of President, Vice President, presidential elector, Member of the United States Senate, Member of the United States House of Representatives, Delegate from the District of Columbia, Guam, or the Virgin Islands, or Resident Commissioner of the Commonwealth of Puerto Rico.

* * * * *

Voting more than once

- (c)(1) Whoever votes more than once in an election referred to in paragraph (2) shall be fined not more than \$10,000 or imprisoned not more than five years, or both.
- (2) The prohibition of this subsection applies with respect to any general, special, or primary election held solely or in part for the purpose of selecting or electing any candidate for the office of President, Vice President, presidential elector, Member of the United States Senate, Member of the United States House of Representatives, Delegate from the District of Columbia, Guam, or the Virgin Islands, or Resident Commissioner of the Commonwealth of Puerto Rico.
- (3) As used in this subsection, the term "votes more than once" does not include the casting of an additional ballot if all prior ballots of that voter were invalidated, nor does it include the voting in two jurisdictions under section 1973aa-1 of this title, to the extent two ballots are not cast for an election to the same candidacy or office.

§ 1973gg-10. Criminal penalties

A person, including an election official, who in any election for Federal office--

- (1) knowingly and willfully intimidates, threatens, or coerces, or attempts to intimidate, threaten, or coerce, any person for--
 - (A) registering to vote, or voting, or attempting to register to vote;
 - (B) urging or aiding any person to register to vote, to vote, or to attempt to register to vote; or
 - (C) exercising any right under this subchapter; or
- (2) knowingly and willfully deprives, defrauds, or attempts to deprive or defraud the residents of a State of a fair and impartially conducted election process, by--
 - (A) the procurement or submission of voter registration applications that are known by the person to be materially false, fictitious, or fraudulent under the laws of the State in which the election is held; or
 - (B) the procurement, casting, or tabulation of ballots that are known by the person to be materially false, fictitious, or fraudulent under the laws of the State in which the election is held, shall be fined in accordance with title 18 (which fines shall be paid into the general fund of the Treasury, miscellaneous receipts (pursuant to section 3302 of title 31), notwithstanding any other law), or imprisoned not more than 5 years, or both.

(Pub.L. 103-31, § 12, May 20, 1993, 107 Stat. 88.)

SUBCHAPTER B. COUNTY ELECTIONS ADMINISTRATOR

§ 31.032. APPOINTMENT OF ADMINISTRATOR; COUNTY ELECTION COMMISSION.

(a) The position of county elections administrator is filled by appointment of the county election commission, which consists of:

- (1) the county judge, as chair;
- (2) the county clerk, as vice chair;
- (3) the county tax assessor-collector, as secretary; and
- (4) the county chair of each political party that made

nominations by primary election for the last general election for state and county officers preceding the date of the meeting at which the appointment is made.

(b) The affirmative vote of a majority of the commission's membership is necessary for the appointment of an administrator.

(c) Each appointment must be evidenced by a written resolution or order signed by the number of commission members necessary to make the appointment. Not later than the third day after the date an administrator is appointed, the officer who presided at the meeting shall file a signed copy of the resolution or order with the county clerk. Not later than the third day after the date the copy is filed, the county clerk shall deliver a certified copy of the resolution or order to the secretary of state.

(d) The initial appointment may be made at any time after the adoption of the order creating the position.

§ 31.035. RESTRICTIONS ON POLITICAL ACTIVITIES.

(a) A county elections administrator may not be a candidate for a public office or an office of a political party, hold a public office, or hold an office of or position in a political party. At the time an administrator becomes a candidate or accepts an office or position in violation of this subsection, the administrator vacates the position of administrator.

(b) A county elections administrator commits an offense if the administrator makes a political contribution or political expenditure, as defined by the law regulating political funds and campaigns, or publicly supports or opposes a candidate for public office or a measure to be voted on at an election. An offense under this subsection is a Class A misdemeanor. On a final conviction, the administrator's employment is terminated, and the person convicted is ineligible for future appointment as county elections administrator.

**SEC. 101. PAYMENTS TO STATES FOR ACTIVITIES TO IMPROVE
ADMINISTRATION OF ELECTIONS.**

(a) In General.--Not later than 45 days after the date of the enactment of this Act, the Administrator of General Services (in this title referred to as the "Administrator") shall establish a program under which the Administrator shall make a payment to each State in which the chief executive officer of the State, or designee, in consultation and coordination with the chief State election official, notifies the Administrator not later than 6 months after the date of the enactment of this Act that the State intends to use the payment in accordance with this section.

(b) Use of Payment.--

(1) In general.--A State shall use the funds provided under a payment made under this section to carry out 1 or more of the following activities:

(A) Complying with the requirements under title III.

(B) Improving the administration of elections for Federal office.

(C) Educating voters concerning voting procedures, voting rights, and voting technology.

(D) Training election officials, poll workers, and election volunteers.

(E) Developing the State plan for requirements payments to be submitted under part 1 of subtitle D of title II.

(F) Improving, acquiring, leasing, modifying, or replacing voting systems and technology and methods for casting and counting votes.

(G) Improving the accessibility and quantity of polling places, including providing physical access for individuals with disabilities, providing nonvisual access for individuals with visual impairments, and providing assistance to Native Americans, Alaska Native citizens, and to individuals with limited proficiency in the English language.

(H) Establishing toll-free telephone hotlines that voters may use to report possible voting fraud and voting rights violations, to obtain general election information, and to access detailed automated information on their own voter registration status, specific polling place locations, and other relevant information.

SEC. 221. TECHNICAL GUIDELINES DEVELOPMENT COMMITTEE.

e) Technical Support From National Institute of Standards and Technology.--

(1) In general.--At the request of the Development Committee, the Director of the National Institute of Standards and Technology shall

provide the Development Committee with technical support necessary for the Development Committee to carry out its duties under this subtitle.

(2) Technical support.--The technical support provided under paragraph (1) shall include intramural research and development in areas to support the development of the voluntary voting system guidelines under this part, including--

(A) the security of computers, computer networks, and computer data storage used in voting systems, including the computerized list required under section 303(a);

(B) methods to detect and prevent fraud;

SEC. 242. STUDY, REPORT, AND RECOMMENDATIONS ON BEST PRACTICES FOR FACILITATING MILITARY AND OVERSEAS VOTING.

(a) Study.--

(1) In general.--The Commission, in consultation with the Secretary of Defense, shall conduct a study on the best practices for facilitating voting by absent uniformed services voters (as defined in section 107(1) of the Uniformed and Overseas Citizens Absentee Voting Act) and overseas voters (as defined in section 107(5) of such Act).

(2) Issues considered.--In conducting the study under paragraph (1) the Commission shall consider the following issues:

(A) The rights of residence of uniformed services voters absent due to military orders.

(B) The rights of absent uniformed services voters and overseas voters to register to vote and cast absentee ballots, including the right of such voters to cast a secret ballot.

(C) The rights of absent uniformed services voters and overseas voters to submit absentee ballot applications early during an election year.

(D) The appropriate preelection deadline for mailing absentee ballots to absent uniformed services voters and overseas voters.

(E) The appropriate minimum period between the mailing of absentee ballots to absent uniformed services voters and overseas voters and the deadline for receipt of such ballots.

(F) The timely transmission of balloting materials to absent uniformed services voters and overseas voters.

(G) Security and privacy concerns in the transmission, receipt, and processing of ballots from absent uniformed services voters and overseas voters, including the need to protect against fraud.

SEC. 245. STUDY AND REPORT ON ELECTRONIC VOTING AND THE ELECTORAL PROCESS.

(a) Study.--

(1) In general.--The Commission shall conduct a thorough study of issues and challenges, specifically to include the potential for election fraud, presented by incorporating communications and Internet technologies in the Federal, State, and local electoral process.

(2) Issues to be studied.--The Commission may include in the study conducted under paragraph (1) an examination of--

(A) the appropriate security measures required and minimum standards for certification of systems or technologies in order to minimize the potential for fraud in voting or in the registration of qualified citizens to register and vote;

(B) the possible methods, such as Internet or other communications technologies, that may be utilized in the electoral process, including the use of those technologies to register voters and enable citizens to vote online, and recommendations concerning statutes and rules to be adopted in order to implement an online or Internet system in the electoral process;

(C) the impact that new communications or Internet technology systems for use in the electoral process could have on voter participation rates, voter education, public accessibility, potential external influences during the elections process, voter privacy and anonymity, and other issues related to the conduct and administration of elections;

(D) whether other aspects of the electoral process, such as public availability of candidate information and citizen communication with candidates, could benefit from the increased use of online or Internet technologies;

(E) the requirements for authorization of collection, storage, and processing of electronically generated and transmitted digital messages to permit any eligible person to register to vote or vote in an election, including applying for and casting an absentee ballot;

(F) the implementation cost of an online or Internet voting or voter registration system and the costs of elections after implementation (including a comparison of total cost savings for the administration of the electoral process by using Internet technologies or systems);

(G) identification of current and foreseeable online and Internet technologies for use in the registration of voters, for voting, or for the purpose of reducing election fraud, currently available or in use by election authorities;

(H) the means by which to ensure and achieve equity of access to online or Internet voting or voter registration systems and address the fairness of such systems to all citizens; and

(I) the impact of technology on the speed, timeliness, and accuracy

of vote counts in Federal, State, and local elections.

(b) Report.--

(1) Submission.--Not later than 20 months after the date of the enactment of this Act, the Commission shall transmit to the Committee on House Administration of the House of Representatives and the Committee on Rules and Administration of the Senate a report on the results of the study conducted under subsection (a), including such legislative recommendations or model State laws as are required to address the findings of the Commission.

(2) Internet posting.--In addition to the dissemination requirements under chapter 19 of title 44, United States Code, the Election Administration Commission shall post the report transmitted under paragraph (1) on an Internet website.

SEC 302(b) Voting Information Requirements.--

(1) Public posting on election day.--The appropriate State or local election official shall cause voting information to be publicly posted at each polling place on the day of each election for Federal office.

(2) Voting information defined.--In this section, the term "voting information" means--

(A) a sample version of the ballot that will be used for that election;

(B) information regarding the date of the election and the hours during which polling places will be open;

(C) instructions on how to vote, including how to cast a vote and how to cast a provisional ballot;

(D) instructions for mail-in registrants and first-time voters under section 303(b);

(E) general information on voting rights under applicable Federal and State laws, including information on the right of an individual to cast a provisional ballot and instructions on how to contact the appropriate officials if these rights are alleged to have been violated; and

(F) general information on Federal and State laws regarding prohibitions on acts of fraud and misrepresentation.

(c) Voters Who Vote After the Polls Close.--Any individual who votes in an election for Federal office as a result of a Federal or State court order or any other order extending the time established for closing the polls by a State law in effect 10 days before the date of that election may only vote in that election by casting a provisional ballot under subsection (a). Any such ballot cast under the preceding sentence shall be separated and held apart from other provisional ballots cast by those not affected by the order.

(d) Effective Date for Provisional Voting and Voting Information.--Each State and jurisdiction shall be required to comply with the requirements of this section on and after January 1, 2004.

SEC. 904. REVIEW AND REPORT ON ADEQUACY OF EXISTING ELECTORAL FRAUD STATUTES AND PENALTIES.

(a) Review.--The Attorney General shall conduct a review of existing criminal statutes concerning election offenses to determine--

- (1) whether additional statutory offenses are needed to secure the use of the Internet for election purposes; and
- (2) whether existing penalties provide adequate punishment and deterrence with respect to such offenses.

(b) Report.--The Attorney General shall submit a report to the Committees on the Judiciary of the Senate and House of Representatives, the Committee on Rules and Administration of the Senate, and the Committee on House Administration of the House of Representatives on the review conducted under subsection (a) together with such recommendations for legislative and administrative action as the Attorney General determines appropriate.

SEC. 905. OTHER CRIMINAL PENALTIES.

(a) Conspiracy To Deprive Voters of a Fair Election.--Any individual who knowingly and willfully gives false information in registering or voting in violation of section 11(c) of the National Voting Rights Act of 1965 (42 U.S.C. 1973i(c)), or conspires with another to violate such section, shall be fined or imprisoned, or both, in accordance with such section.

(b) False Information in Registering and Voting.--Any individual who knowingly commits fraud or knowingly makes a false statement with respect to the naturalization, citizenry, or alien registry of such individual in violation of section 1015 of title 18, United States Code, shall be fined or imprisoned, or both, in accordance with such section.

Statement of
Barry H. Weinberg
Before the
Subcommittee on the Constitution
Committee on the Judiciary
United States House of Representatives
Concerning

The Voting Rights Act: Sections 6, 7 and 8– Federal Examiner and Observer Provisions

November 15, 2005

Chairman Chabot, Ranking Member Nadler, distinguished members of the Subcommittee:

Thank you for inviting me to talk this afternoon about the federal examiner and federal observer provisions of the Voting Rights Act.

There are three central questions on the retention of the federal examiner and federal observer provisions of the Voting Rights Act:

1. Are the federal examiner and federal observer provisions still needed?

The federal observer provision is still needed. Most of the federal examiner provisions are no longer are needed.

2. Should the initial assignment of federal observers to a jurisdiction remain dependent on the certification of the jurisdiction for federal examiners?

No, but a certification-like decision should be required when federal observers are initially assigned to a jurisdiction.

3. Should the federal observer provision remain solely as a law enforcement tool, or should the findings of the observers be made immediately available to the public?

The federal observer provision should remain as a law enforcement function. Publication of the observers' findings would be detrimental to that function.

The following is an overview of the federal examiner and federal observer provisions of the Voting Rights Act, my experience with them, and the reasons why I

have answered the questions as I have. This recitation is followed by a detailed explanation of the Voting Rights Act's provisions for federal examiners and observers—Sections 6, 7 and 8 of the Voting Rights Act—and fact situations and federal court cases that demonstrate why the federal observer provisions are still needed.

The federal examiner and federal observer provisions had a real impact on African Americans in the South.

I was a lawyer in the United States Justice Department's Civil Rights Division from 1966 until my retirement in January 2000. Beginning in 1973 I was partly, and shortly thereafter, wholly in charge of the Justice Department's responsibilities for the federal examiner and federal observer programs. But I began working in the Civil Rights Division as a law clerk in the summer of 1965, and I was there on August 6, 1965, when the Voting Rights Act became law. Shortly after the Act was passed I was assigned to accompany the many other employees of the Civil Rights Division who were working out of an office set up in the federal building in Selma, Alabama. Our primary job was to investigate the beatings suffered by people who earlier that year attempted to march from Selma to Montgomery, Alabama, to protest the disenfranchisement of African Americans in Alabama.

I traveled with Civil Rights Division lawyers from county to county in West Central Alabama to determine the identity of the victims of those beatings and to interview them. As we traveled, we also got information on possible violations of the provisions of the Civil Rights Act of 1964, and we stopped into the offices where federal examiners were giving African Americans their first easy, safe and fair opportunity to register vote. (Local voter registration hours and locations were so restrictive that some white people took advantage of the easy federal voter registration opportunities too.)

Those events gave rise to the issues we are addressing now, 40 years later. A discussion of these issues can easily get blurred by a numbing recitation of legal statutes, provisions and clauses, because that is how the Voting Rights Act is written. I will set out those citations later in my statement by providing sections of an article my wife and I published in the Spring 2002 edition of the Temple Political and Civil Rights Law Review. But first I want to review the federal examiner and federal observer provisions of the Voting Rights Act as they applied to people and voting in the real world.

Under the structure of the Voting Rights Act, a federal examiner can be assigned to any site in the states and counties that are specially covered under the Act's formulae in Section 4, after the county has been certified by the Attorney General of the United States (or in any county certified by court order). Of course, under the structure of the Voting Rights Act, the federal examiners do not technically register people to vote: they examine applicants as to their eligibility under state voter registration laws that are otherwise Constitutional, and then put those applicants who are found to be eligible on a list. The list is given to the local county voter registrar who is required by the Voting Rights Act to enter the eligible applicants' names on the local voter registration rolls.

In the summer and fall of 1965 people were lined up day after day to take advantage of their first opportunity to register to vote. The federal examiners were Civil Service Commission investigators who had been pulled off of the routine jobs they had been doing and sent to sites in Alabama and other Southern states that had been designated by the U.S. Attorney General for federal listing. Besides listing voter applicants, the examiners were available to take complaints about listed people who had not been placed on the county voter registration rolls.

Those examiners were not, on the whole, a happy group. Their presence in small groups of two or three was obvious in town, and their work was opposed by many of white people there. In the main, they ate alone, walked alone and talked mostly to each other. The examiners were eager to know from us, on our rounds, when they would be able to go home. Still, they persevered, and in the end they accounted for the registration of tens of thousands of people who had been discriminatorily kept off of the voter registration rolls. From 1965 to 1972 federal examiners were responsible for the registration of over 170,000 voters. They achieved a signal victory in the fight against racial discrimination in voting.

As the Voting Rights Act is structured, federally registered voters have continuing protection against attempts at keeping them from voting. In any county that has been certified for a federal examiner, the Voting Rights Act authorizes the United States Office of Personnel Management (the successor to the United States Civil Rights Commission) to assign federal observers to polling places as requested by the U.S. Attorney General, to watch voting and vote counting procedures. (Note that the certification of a county for federal examiners is a prerequisite for the assignment of federal observers, but the presence of federally listed voters in the county is not.)

That protection was badly needed in the mid-1960s for newly registered African American voters as they entered the polling places and weathered the stares of white voters and the hostility of the polling place officials. Some examples of the humiliations they faced are set out later in my statement. But for now it is enough to know that they, too, persevered, and under the protective presence of the federal observers, they cast their ballots and participated in the political life of the county for the first time.

The federal observers' job is to watch and take notes. If polling place officials choose to violate their own procedures in order to humiliate racial or minority language voters, or intimidate them, or refuse to allow them the same voting privileges in the polls as the white voters, the federal observers cannot intervene. The observers in a county have co-captains who travel from polling place to polling place, checking with the observers and getting information from them. Those observer co-captains call regularly to a central office established by the Office of Personnel Management. Originally, and for many years, this central office was known as the examiner's office, which had been established for the examiner to take complaints as is required by Section 12(e) of the Voting Rights Act. In the examiner's office there also was a lawyer from the Justice Department's Civil Rights Division (usually from the Voting Section, *nee* Voting and Public Accommodations Section). Today, since the examiner has little or no function,

especially in a county where there are no federally registered voters, the office used in the county on election day is referred to as the captain's office. The observer captain along with a Civil Rights Division attorney are there to receive the calls and the information from the observer co-captains.

When irregularities arise the Division lawyer relays the information about the irregularities to the county official in charge of the election, and allows the county official to take action to correct the irregularities. Where corrective action is not taken or is inadequate, a civil action can be filed later under the Voting Rights Act. A civil action, such as the one described below involving Conecuh County, Alabama, can use the reports of federal observers as effective and unassailable evidence of racially discriminatory actions of polling place officials. After the election the observers provide their reports to the federal examiner, the Attorney General and, if appropriate, to a federal court (if the county is certified for an examiner by a court).

The work of the federal observers as described here continued in the South largely unchanged through the 1990s. These procedures apply too, to the work of federal observers in other areas of the country with important modifications to deal with geographical differences and activities in polling places involving minority language voters.

Federal observers are necessary, federal examiners are not necessary.

Violations of the Voting Rights Act continue to happen in polling places throughout the United States. The need for federal observers to document discriminatory treatment of racial and language minority voters in the polls has not waned. The use of a thousand or more federal observers at election after election beginning in 1965 decreased to the use of hundreds of observers at elections after the early 1980s as a result of the effective enforcement of the Voting Rights Act in Southern states. But the enforcement of the language minority provisions of the Voting Rights Act, added in 1975, has required the use of hundreds more federal observers to disclose to Justice Department attorneys evidence of harassment of members of language minority groups, and instances where ballots and other election material and procedures are not available to those voters in a language they can understand. The result is that between 300 and 600 federal observers continued to be needed annually from 1984 to 2000.

The facts supplied by federal observers to Civil Rights Division attorneys are crucial and irreplaceable in the enforcement of the Voting Rights Act. Most parts of the voting process are open to the public, and the evidence of Voting Rights Act violations that are involved in the voting process can be obtained by Justice Department lawyers through routine investigations. But most state laws limit access to polling places on election day, allowing only voters and polling place officials to remain in the polls (police are allowed too when called to deal with disturbances). Thus, unless an exception is made in these rules to allow federal investigators to get special access to the polls, the harassment of racial and minority language voters and other violations of the Voting Rights Act inside the polling places would go unseen and unchecked.

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Federal observers have special access to polling places under the authority of the Voting Rights Act even where access to Justice Department attorneys is otherwise barred. Federal observers thus become the attorneys' eyes and ears. The discriminatory treatment of racial and minority language voters witnessed by the federal observers, as discussed in detail below, runs the gamut from actions that make those voters feel uncomfortable by talking rudely to them, or ridiculing their need for assistance in casting their ballot, to actions that bar them from voting, such as failing to find their names on the lists of registered voters and refusing to allow them to vote on provisional ballots, or misdirecting them to other polling places.

Minority language voters suffer additional discriminatory treatment when people who speak only English are assigned as polling place workers in areas populated by minority language voters. The polling place workers fail to communicate the voting rules and procedures to the voters, or fail to respond to the voters' questions. In some instances, qualified registered voters have been told that they are not permitted to vote because they have not furnished necessary information, such as their address, even when they have provided the information; the poll worker was unable to understand what the voters were saying, but a speaker of the minority language would have understood.

Civil Rights Division lawyers who receive facts from federal observers about violations of the Voting Rights Act provide those facts directly to the election officials in the jurisdictions involved, allowing them to take corrective action in compliance with the Act. In other instances, those facts are used to secure court orders requiring that the jurisdictions involved to comply with the dictates of the Voting Rights Act. In either approach, the end result fulfills the goal of the Voting Rights Act to allow United States citizens to cast their ballots on election day freely and fairly, without distinction because of their race or membership in a language minority group.

That the work of the federal observers is a part of a law enforcement effort—the enforcement of the Voting Rights Act—is especially true where the information from the federal observers is provided in the context of a lawsuit, where a court has certified a county that was not specially covered under the Voting Rights Act. In that situation, the information is given to the court and affects the position of the parties (the Justice Department and the county) with respect to the actions the jurisdiction must take to comply with the Act (the relief that is ordered in the case). Some local election officials have come to welcome the information obtained by federal observers as an additional source showing the extent to which the county's polling place officials are complying with the provisions of the Voting Rights Act.

However, the initial assignment of federal observers to a county today remains dependant on the certification of the county for the assignment of federal examiners even though federal examiners are largely unnecessary any more for listing voter applicants. There has been no federal listing of voters since the 1970s, apart from an isolated flurry of voter listing in Georgia in 1982 and another isolated flurry in Mississippi in 1983. Discriminatory actions against racial and language minority group members are not

caused by their status as federally registered voters. And examiners no longer receive complaints on election day with respect to federally listed voters. I do not recall any complaints that were received centering on mistreatment of federally listed voters over the last 20 years of my supervision of the federal observer and examiner programs, and few, if any such complaints before that. (Complaints about other matters are made to the examiner, but they routinely involve matters for which the federal observers have been assigned to the county, and are just as easily, and more effectively fielded by the federal observer captain in the county.) Moreover, the enforcement of the Voting Rights Act and the enactment of new easy voter registration laws, such as the National Voter Registration Act (the motor voter law), have made the possibility of future listings by federal examiners highly unlikely.

Further, the Office of Personnel Management must continue to keep the lists of federally listed voters up to date regarding changes of name, changes of address and, as the years have gone by, of deaths. Those voters cannot be removed from the voter rolls without the approval of the Office of Personnel Management, and the lists continued to be provided for election day use by those counties where there are federally listed voters. In fact, these lists are no longer used for any practical purpose, and their maintenance should be discontinued.

It is possible that federal examiners may be needed in the future for voter listing in a situation where the dictates of the Voting Rights Act are met, so the Voting Rights Act's authorization for federal examiners to conduct listing activity should be retained. But there is no reason to continue to tie the assignment of federal observers to the appointment of a federal examiner. I believe that, apart from the possible need for listing voters, the federal examiner provisions are outdated and are no longer needed in the Voting Rights Act, especially the requirement that an examiner be appointed as a prerequisite for the assignment of federal observers to a county.

But the procedure for the certification of a county for federal examiners under Section 6 of the Act serves an important purpose: it requires the Justice Department to conduct an intensive investigation to support the certification, and thus makes the federal government responsible for taking action regarding local election procedures only on the basis of complete and compelling facts. I believe that some manner of certification should remain a prerequisite for the initial assignment of federal observers to a county and, once certified, that a county would remain certified, as is now the case, until it acted to eliminate the certification (the formula under Section 13 for terminating certification would be changed).

If such a new certification procedure would be instituted, the requirement that the United States Attorney General personally must sign the certification, as is now the case, would be unnecessary. This authority for executing a certification should be allowed to be delegated to the Assistant Attorney General for Civil Rights. To my recollection, the Attorney General has signed every certification that has been recommended by the Assistant Attorney General for Civil Rights. Nor would the Attorney General's signature be needed any more to assure the importance of the certification if the only consequence

of a certification would be simply to allow federal observers to witness polling place procedures. The delegation to the Assistant Attorney General for Civil Rights of the responsibility for certifying a county for the presence of federal observers would be similar to the delegation of authority to the Assistant Attorney General to object to changes in voting practices and procedures under Section 5 of the Voting Rights Act.

The purpose of the present requirement in the Voting Rights Act that the Attorney General's certification of a county be published in the Federal Register is to give notice of the location of the federal examiner's office. Since it no longer will be necessary to have an office for a federal examiner when federal observers are assigned, the publication of the location of that office also will be unnecessary. Those who will most need to know of the assignment of federal observers—county officials and minority group representatives—always are informed personally by Civil Rights Division attorneys, and other members of the community easily learn of the observers' presence from Division attorneys, local press reporting and word of mouth.

Accordingly, I believe that the federal observer provision is still necessary to the enforcement of the Voting Rights Act, but the Voting Rights Act no longer should tie the assignment of federal observers to the appointment of a federal examiner. The Act should allow a certification function, newly directed only to the assignment of federal observers, to be delegated to the Assistant Attorney General for Civil Rights. The requirement for publication of the certification in the Federal Register—an adjunct of the federal examiner function—should be eliminated as a prerequisite to the initial assignment of federal observers.

Federal observers' work should continue to be a law enforcement function.

I also recommend that the function of the federal observers remain as it is: as witnesses in a law enforcement function. The question arises because, since my retirement, I have been an observer four times in other countries as a part of an international observer corps assembled by the Organization for Security and Cooperation in Europe (OSCE) under its Office for Democratic Institutions and Human Rights (ODIHR). The forms these observers use list polling place procedures and have a place for the observer's rating from good to bad (1 to 3, or 1 to 5) for each procedure. There are separate forms for the opening of the polls, for voting during the day, and for the closing of the polls. A fourth form allows for fuller explanation of any item or event.

The object of the observation by ODIHR is to report information for public consumption as quickly as possible. During election day the observers send their forms to ODIHR headquarters in the country's capitol at mid-morning, shortly after noon, and just before the polls close; the remaining forms are dropped off when the observers return from the vote count to their regional lodging sites throughout the country. This way, by the afternoon of election day OSCE/ODHIR knows how the election is going, whether there are serious problems, and if so, what they are and where they are. Then, on the morning after the election, OSCE issues its judgment on whether the election was conducted according to international standards or was marred by irregularities.

But OSCE is not a law enforcement organization, and its approach would not be appropriate to the job of the Justice Department. Some of the irregularities that the federal observers can witness are not dissimilar from the kind of procedural irregularities that are common to elections held in emerging democracies. The extra identification steps required of Arab Americans in Hamtramck, Michigan, and the harassment they encountered, described below, are an example. But the similarity of some situations to those addressed by international observer groups such as the OSCE does not argue for redesigning the federal observer program under the Voting Rights Act to resemble those organizations' efforts.

In fact, the federal observer program is an effective law enforcement program as it is now constituted. If observers are desired to watch polling place activities for other purposes, those functions should be performed by other observers serving other functions. "Domestic" observers in other countries are allowed into the polling places to get information for their candidates, or political parties, or organizations, and routinely publicize the activities they witness. Those countries' elections, however, are conducted centrally, by a central (in the U.S. it would be a federal) election commission, and the observers' activities are under that central control. The laws of those countries specifically allow domestic as well as international observers into the polling places. The observers are granted permission to be in the polls and are issued identification tags for that purpose by the central or district election commissions, which can withdraw that permission at any time.

This kind of observation is not a matter within the purview of existing federal legislation in this country, and to have federal legislation allowing these kinds of observers in polling places a record would have to be established by the United States Congress justifying their presence in connection with federal elections. On the other hand, in the United States access to the polling places is controlled by state law, and some states allow such observers into the polling places now. States routinely also allow the press into the polls to witness the activities there. Finally, redacted versions of the federal observers' report forms may be obtained under the Freedom of Information Act (FOIA) subject to the FOIA rules and the Privacy Act.

The following analysis provides the specific support for my conclusion that the federal observer provision of the Voting Rights Act should be continued because it is clearly needed to provide the Justice Department with evidence of violations of the Voting Rights Act's prohibitions against discrimination in the polling places against racial and language minority group members. This analysis is taken from an article my wife and I wrote for the Temple Political and Civil Rights Law Review, Spring 2002 edition, Vol. 2, Number 11.

The special provisions of the Voting Rights Act were compelled by resistance to African Americans' voting rights.

Congress had found that case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in these lawsuits. After enduring nearly a century of systematic resistance to the Fifteenth Amendment, Congress might well decide to shift the advantage of time and inertia from the perpetrators of the evil to its victims.

South Carolina v. Katzenbach, *supra* at 328.

The Voting Rights Act (the “Act”) cut through the protective barrier of federalism with two important sections. Section 5 of the Act, 42 U.S.C. § 1973c (the “preclearance” provision), required federal review of any new voting procedures that states and counties might adopt. This prohibited the adoption of new discriminatory practices when a jurisdiction’s present practices were found to be unlawful. And Section 4 of the Act, 42 U.S.C. § 1973b, instantly led to the enfranchisement of thousands of people by suspending the use of literacy tests and similar discriminatorily applied barriers to the registration of African Americans in the Deep South.¹ Some states, such as Virginia, immediately stopped using literacy tests. In other Southern states, federal examiners were appointed under Section 6 of the Act, 42 U.S.C. § 1973d, assigned to counties to conduct fair voter registration under Section 7 of the Act, 42 U.S.C. § 1973e, when white county officials refused to stop their racially discriminatory voter registration practices.² This was no small task, as over 170,000 people were registered between 1965 and 1972 through the efforts of the federal examiners, mostly in Alabama, Georgia, Louisiana, and Mississippi. *Semiannual Report of Cumulative Totals on Voting Rights Examining as of*

¹ These “tests or devices” were suspended in states and counties determined by a formula in Section 4 of the Voting Rights Act, 42 U.S.C. § 1973b, based on the use of literacy tests and other pre-application devices (such as having current voters vouch for your good moral character), and low voter turnout. Later, this provision was made permanent and nationwide. 42 U.S.C. § 1973aa. Originally, states and counties covered under the formula in Section 4 of the Act could terminate their special coverage (“bail out”) after five years by showing in a lawsuit before a three-judge court in the federal district court for the District of Columbia, that no test or device had been used to deprive anyone of the right to vote during that period. Since the Act itself suspended those tests or devices for only 5 years, it was thought that it would be relatively simple for states and counties who complied with the suspension to bail out after the 5-year period. In 1970 the time period in Section 4 was extended to 10 years, in 1975 it was extended to 17 years. In 1982 the approach was changed, and the special coverage under Section 4 will expire 25 years after August 5, 1984, the effective date of the 1982 Amendments, 42 U.S.C. § 1973b(a)(8). In 1982 the bail-out provisions were amended substantially to allow individual counties within a fully covered state to bail out, and to set out a number of specific qualifications that a jurisdiction needs to meet in order to bail out. 42 U.S.C. § 1973b(a)(1)-(3).

² The examiners are commonly referred to as federal registrars. These were people appointed by the head of the Civil Service Commission, now the Office of Personnel Management, to examine voter applicants as to their qualifications under state law. If the applicants satisfied the state requirements, their names were put on a list that was given to the county registrar, who then had to add them to the county voter registration rolls. In this way, some semblance of state authority over the voter registration process was preserved: registrants satisfied state requirements, and a state-authorized official put the voters’ names on the rolls. 42 U.S.C. § 1973e(b). To safeguard against discriminatory purges of those newly enfranchised voters, their names cannot be purged from the voter rolls without the approval of the Office of Personnel Management. 42 U.S.C. § 1973e(d).

December 31, 2000, Prepared by the Office of Workforce Information, Office of Merit Systems Oversight and Effectiveness, U.S. Office of Personnel Management. See Appendix A for the number of people, by state, registered by federal examiners.

Further, in order to allow the U.S. Attorney General to know whether discriminatory action was taken against the newly enfranchised voters in the polling places on election day, Section 8 of the Act allowed that, whenever an examiner has been appointed,

[T]he Director of Personnel Management may assign, at the request of the Attorney General, one or more persons, who may be officers of the United States, (1) to enter and attend at any place for holding an election...for the purpose of observing whether persons who are entitled to vote are being permitted to vote, and (2) to enter and attend at any place for tabulating the votes cast at any election...for the purpose of observing whether votes cast by persons entitled to vote are being properly tabulated.

42 U.S.C. § 1973f.

Thus, the use of federal observers in polling places initially was directed at protecting the rights of new voters who had been registered by federal examiners. Even though federal voter registration was rare after 1972, the predicate under the Voting Rights Act for assigning federal observers has not changed: federal observers continued to be allowed only in counties that had been certified by the U.S. Attorney General for federal examiners. As a result, to allow the assignment of federal observers to a county, the county had to be certified by the U.S. Attorney General or a federal court (under Section 3(c) of the Act, 42 U.S.C. § 1973a(c)) for federal examiners.³ The assignment of federal observers continues to be a cornerstone of the enforcement of the Voting Rights Act. Over 23,000 federal observers have been assigned to monitor polling place procedures since 1966, 4,393 since 1990 alone.⁴ See Appendix B, Assignment of Federal Observers Under Section 8 of the Voting Rights Act, 42 U.S.C. § 1973f, by Year and State.

³ Since the federal examiner and federal observer provisions of the Voting Rights Act focus on political subdivisions, which ordinarily are counties, a county must be certified for federal examiners even if the object is to assign federal observers to monitor polling places during a city or other election, such as a school board election, within the county. See 42 U.S.C. §§ 1973d, 1(c)(2).

⁴ There were 4,698 federal observers assigned to polling places in 5 states from 1966 through 1969; 7,034 federal observers were assigned to 9 states in the 1970s; 6,598 federal observers were assigned to 11 states in the 1980s, and 3,753 federal observers were assigned to 13 states in the 1990s. In 2000, 640 federal observers were assigned to 11 states. See, Appendix B.

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Federal observers witnessed clear racial discrimination at the polls.

Federal observers were able to note and document a wide variety of discriminatory actions that were taken against African Americans in the polls. Some of these actions were insulting and direct, as are reflected in the United States' responses to interrogatories in *United States v. Conecuh County, Alabama*, Civil Action No. 83-1201-H (S.D. Ala., Jun 12, 1984).⁵ See Appendix C.

While providing assistance to a black voter, white poll official Albrest asked, "Do you want to vote for white or niggers?" The voter stated that he wanted to give everyone a fair chance. Albrest proceeded to point out the black candidates and, with respect to one white candidate, stated, "This is who the blacks are voting for." Poll official Albrest made further reference to black citizens as "niggers" in the presence of federal observers, including a statement that "niggers don't have principle enough to vote and they shouldn't be allowed. The government lets them do anything."

Plaintiff's Response to Interrogatories and Request for Production of Documents, p. 6.

White poll workers treated African American voters very differently from the respectful, helpful way in which they treated white voters. When questions arose about the voter registration data for a white person, such as a person's address or date of registration, or when a white person's name was not immediately found on the poll books, the voter was addressed as Mister or Misses, was treated with respect, and the matter was resolved on the spot. If the voter's name was not found, often he or she either was allowed to vote anyway, with his or her name added to the poll book, or the person was allowed to vote a provisional or challenged ballot, which would be counted later if the person were found to be properly registered. If, however, the voter was black, the voter was addressed by his or her first name and either was sent away from the polls without voting, or told to stand aside until the white people in line had voted. African American voters were not allowed to take sample ballots into the polls, and were made to vote without those aids (it was claimed by white officials that the sample ballots were campaign material which was prohibited inside the polls).

African American voters who were unable to read and write, due in large part to inferior segregated schools and the need to go to work in the fields at an early age, were refused their request to have someone help them mark their ballot, notwithstanding the Voting Rights Act's bar on literacy tests. In some instances, white poll workers would loudly announce the African American voter's inability to read or write, embarrassing the

⁵ The federal observers' reports are not public documents, so there are very few examples on the public record of the facts that the observers have witnessed. One such public document is the Plaintiff's Response to Interrogatories and Request for Production of Documents in *United States v. Conecuh County, Alabama*, supra. Some of the specific examples of the kind of discriminatory treatment that was afforded African American voters described in the text that follows are taken from the excerpts of the *Conecuh County* responses at Appendix C, while others are based on the author's first-hand knowledge.

voter in front of his or her neighbors. Some white poll workers went so far as to bring a magnifying glass to the polls, and give it to African American voters, challenging the voter to read using the magnifying glass in front of everyone present at the polling place. Illiterate white voters, on the other hand, were allowed assistance by a person of their choice without comment. White couples routinely were allowed to enter the voting booth together to mark their ballots.

In instances where African American voters were allowed an assistor in the booth, arbitrary rules were concocted that limited the number of voters an assistor could help, or made the assistor wait outside the polling place, requiring the voter to enter the polls alone and negotiate alone the sign-in procedures administered by unfriendly white poll workers, before being allowed to ask that the assistor be allowed to help.⁶ All too often, when the voter said he or she needed assistance the white poll worker would proceed to help the voter, and not give the voter a chance to ask for the assistor the voter wanted; the voter did not know if the poll worker cast the ballot as the voter desired, and had no confidence that the ballot was cast correctly.

Moreover, racial discrimination in the polls is not limited to African Americans, and is not limited to the South. On November 2, 1999, in the City of Hamtramck, Michigan, the qualifications of more than 40 voters were challenged on grounds that they were not citizens. They were challenged by members of a group known as Citizens for a Better Hamtramck (CCBH), organized to keep elections pure. As described in the Consent Order and Decree in *United States v. City of Hamtramck*, Civil Action No. 00-73541 (E.D. Mich, Aug 7, 2000),

6. ...Some voters were challenged before they signed their applications to vote. Other voters were challenged after they had signed their applications and their names had been announced. The challenged voters had dark skin and distinctly Arabic names, such as Mohamed, Ahmed, and Ali. The challengers did not appear to possess or consult any papers or lists to determine whom to challenge.

7. Once challenged, the city election inspectors required the challenged voters to swear that they were American citizens before permitting them to vote. Voters who were not challenged were not required to do so. The city election inspectors did not evaluate the propriety of merit of the challenges. Some dark-skinned voters produced their American passports to identify themselves to election officials. Nevertheless, these persons were challenged by CCBH, and the election inspectors required them to take a citizenship oath as a prerequisite to

⁶ After the Voting Rights Act enabled African Americans in the Deep South to register to vote, it became common for civil rights workers and local African American residents to drive the new voters to the polls and to give assistance to those who needed it. This was a natural outgrowth of the organizing required during the civil rights movement to achieve voter registration for black people. It provided transportation—many people did not have cars—and gave confidence and protection to these newly enfranchised voters at the polling places from which they had so recently been excluded by white poll workers and voters who did not want them there. This tradition of “hauling” voters to the polls and giving assistance to voters who need it continues today, especially in many rural areas.

voting. No white voters were challenged for citizenship. No white voters were required to take a citizenship oath prior to voting.

at p. 4.

The consent decree also states that city officials were apprised of the incidents, that they consulted with state election officials who were present in Hamtramck on election day, but neither the state nor the city election officials prevented the baseless challenges from continuing. It was claimed that other Arab-American citizens may have heard about the incidents and decided not to go to the polls to vote that day.

Federal observers witnessed clear discrimination against language minority group members at the polls.

Besides discriminatory treatment of citizens based on race, citizens who speak English poorly, or not at all, have faced obstacles to voter registration and voting. In 1975 Congress took note of discrimination against people who have only a limited ability to speak English. For them, printing or providing information only in English as effective as a literacy test in keeping them from registering to vote or casting an effective ballot. Such disenfranchisement was outlawed when the Voting Rights Act was amended and expanded in 1975. The terms of Section 4 of the Act, containing the formula for applying special coverage to counties, were changed to include among prohibited tests and devices,

[T]he practice or requirement by which any State or political subdivision provided any registration or voting notices, forms, instructions, assistance or other material or information relating to the electoral process, including ballots, only in the English language, where the Director of the Census determines that more than five per centum of the citizens of voting age residing in such State or political subdivision are members of a single language minority.

42 U.S.C. § 1973b(f)(3). Language minorities are defined in the Voting Rights Act as American Indian, Asian American, Alaskan Natives, and people of Spanish heritage. 42 U.S.C. § 1973l(c)(3). Political subdivisions as defined in the Act usually are counties. 42 U.S.C. § 1973l(c)(2).⁷

The 1975 amendments to the Act required that when the newly covered jurisdiction

...provides any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, it shall provide them in the language of the applicable language minority group as well as in the English language...

⁷ The jurisdictions subject to the special provisions of the Voting Rights Act are listed in the Appendix to 28 U.S.C. Part 51.

42 U.S.C. § 1973b(f)(4)⁸

Counties in Arizona, New Mexico and Utah were certified for federal examiners, and federal observers were assigned to document the extent to which the English language was used in areas where many of the voters spoke Native American languages but understood English only marginally. Similarly, federal observers have been assigned to polling places in Spanish language areas of Arizona, Texas, New Jersey and New York City, and Chinese language areas of New York City, and San Francisco and Oakland, California.⁹ In all these areas minority language citizens were allowed to register to vote, but the use of the English language instead of the voters' first language prevented them from understanding the voting instructions and the ballot. Polling place workers either were not able to speak the language of the voters, or if they could, were not trained to translate the documents and procedures into the language of the voters. By the 1990s federal observers were assigned to monitor discrimination against language minority group members in numbers equal to the federal observers assigned to monitor non-language racial discrimination.¹⁰

The need for the language minority provisions of the Voting Right Act continues to be demonstrated in areas of the country where English is not persons' primary language. Normally one would assume that polling place workers would be chosen from the population where the polling place is located, and that they would speak another language in addition to English with the same frequency as the voters. In many instances, however, this did not happen. For example, in ethnically changing neighborhoods in New York City, the choices of the political party apparatus resulted in the repeated appointment of English-speaking poll workers where a large portion of the new voters in a precinct were Spanish-speaking Puerto Ricans. In Passaic, New Jersey, English-speaking poll workers were unable to find the names of Spanish-speaking voters

⁸ A parallel requirement was added in Section 203 of the Voting Rights Act in 1975 for counties determined by different formula. 42 U.S.C. § 1973aa-1a. Section 203 of the Act does not include the other special provisions of Section 4, such as the preclearance, federal examiner and federal observer provisions. Lawsuits under Section 203 must be brought before a three-judge court. As a result of amendments since 1975, coverage under Section 203 now applies to counties that have more than 5 percent of voting age citizens who are members of a single language minority and are limited-English proficient; have more than 10,000 voting age citizens who are members of a single language minority and are limited-English proficient; or have a part of an Indian reservation, and more than 5 percent of the American Indian or Alaska Native voting age citizens are members of a single language minority and are limited-English proficient; and the illiteracy rate of the language minority group citizens is higher than the national illiteracy rate. 42 U.S.C. § 1973aa-1(a)(2). The counties covered under the language minority provisions of Sections 4 and 203 are listed in the Appendix to 28 U.S.C. Part 55.

⁹ Counties in Arizona, New York and Texas were certified by the U.S. Attorney General. Counties in California, New Mexico and Utah were certified by federal district courts under Section 3(c) of the Act, 42 U.S.C. § 1973a(c). Section 3(c) provides for certification in a lawsuit brought "under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment...(1) as part of any interlocutory order...or (2) as part of any final judgment if the court finds that violations of the fourteenth or fifteenth amendment justifying equitable relief have occurred..."

¹⁰ From 1990 through 2000, there were 2,449 federal observers assigned to elections in the states of the Deep South, very few of which involved discrimination against language minority group members, and there were 2,215 federal observers assigned to monitor elections in other areas of the country, most of which involved discrimination against language minority group members. See Appendix B.

in the polls books because the poll workers did not know that the voters' family name traditionally was the second of three names they used. Some voters were denied the ballot because they identified their street name according to common Spanish usage rather than the formal English name.¹¹ In Texas and Southern Arizona polling places Hispanic voters were admonished not to use Spanish when talking in the polling places and when giving assistance to voters who needed help when voting. Moreover, the citizenship of Hispanic voters was questioned at the polls, with voters being required to somehow provide on-the-spot evidence of their citizenship before being given a ballot; such evidence was not required of Anglo voters.¹²

Evidence of other kinds of discriminatory behavior of polling place workers and others toward Spanish language voters inside the polls is provided in the reports of the Independent Elections Monitor appointed in September 2000 by the court in a consent decree in *United States v. Passaic City, New Jersey, and Passaic County, New Jersey*, Civil Action No. 99-2544 (NHP) (D.N.J., Sep. 5, 2000)(three-judge court).

At P.S. 6, observers called to report that the challenger was making racist remarks about Hispanics. At the Ukrainian school, challengers became very aggressive and were yelling at voters, stating that they did not live in the country and should not vote. Ironically, many of these challenged voters were off-duty Passaic City police officers. Angel Casabona, Jr. was one such challenged police officer who avoided confrontation and properly came to Passaic City Hall to have his voting status clarified. Escorted by the City Clerk and investigators from the prosecutor's office, Mr. Casabona reentered the polling site and was permitted to exercise his vote. The brazen challenger was reprimanded and board workers were reminded that challengers should not be interacting with voters.

Walter F. Timpone, Office of the Election Monitor, Fifth Report, June 15, 2001, pgs. 3-4.

The most disturbing incident of the [June 26, 2001 municipal primary election] occurred at the polling place at St. Mary's School in Passaic. Someone allegedly stole the flag from outside the polling place. The police were called. An officer responded and caught the purported perpetrator. The Officer entered the polling place and asked who had called the police. No one responded. The officer barked comments in substance to the poll workers as follows, "Can't you read? What country do you come from?" When a municipal worker of Indian origin came to see what the problem was, the officer then asked, "And what country do you come from?" When a Latino federal observer tried to explain the

¹¹ Mail addressed to streets using the Spanish nickname was delivered because the postal personnel were familiar with the local Spanish language usages, as the poll workers were not.

¹² Anglo candidates compiled lists of Hispanic voters' names for their poll watchers to challenge at the polls on the ground that the voters were not citizens. United States citizenship is required by every state as a qualification to register to vote in state and federal elections. But in order to avoid discriminatory treatment of voters at the polls and disrupting the polling places with election-day challenges, persons who, before an election, have evidence that a registered voter is not a U.S. citizen should be required to present that information to the voter registrar, and to desist from interposing challenges at the polls to voters whose qualifications have been upheld by the register.

dictates of the consent decree, the officer asked for credentials. When the observer showed his credentials, the officer found them inadequate because they lacked a picture and detained the observer. The Officer told the observer, "I could arrest you for this." Upon being alerted to the controversy, I asked investigators from the Passaic County Prosecutors Office and Deputy Chief of the Passaic County Police Department to intercede. When a Sergeant from the Passaic Police department responded at the scene and learned what had happened, he apologized to the federal observer and told him he thought some sensitivity training might be in order for the officer. Notably, this discriminatory behavior took place in a city where the Latino population is at 62%. Intolerance in the city is still existent and hiding under color of official right.

Walter F. Timpone, Office of the Election Monitor, Sixth Report, July 27, 2001, pp. 6-7.

The use of English rather than Chinese in polling places in Chinese neighborhoods of San Francisco and Oakland (Alameda County), California, and New York City left voters confused about procedures, and ignorant of ballot propositions and contested offices. As was noted in the Settlement Agreement and Order in *United States v. Alameda County, California*, C95 1266 (N.D. Cal, Jan 22, 1996)(three-judge court),

According to the 1990 Census, the population of Alameda County includes 68,184 Chinese Americans and 30,120 Chinese American citizens of voting age. The 1990 Census reports that 11,394 persons, or 37.83 percent of the Chinese citizen voting age population in Alameda County, and 1.3 percent of the total citizen voting age population in Alameda County do not speak English well enough to participate effectively in English language elections. Thus, over 11,000 Chinese American citizens in Alameda County cannot function effectively in the electoral process except in the Chinese language.

at p. 4.

Problems were compounded in Native American areas of Arizona, New Mexico and Utah. The problems faced by Native Americans in these areas are illustrated in Cibola County, New Mexico, which contains the Ramah Chapter of the Navajo Reservation and the Acoma and Laguna Pueblos. The Stipulation and Order in *United States v. Cibola County, New Mexico*, No. Civ 93 1134 LH/LFG, (D.N.M., Apr 21, 1994)(three-judge court), states that,

5. According to the 1990 Census, 57.8 percent of the Navajo voting age population and 18.1 percent of the Pueblo voting age population in Cibola County do not speak English well enough to participate effectively in English language elections. Thus, a significant proportion of the Native American population of Cibola County, and a significant majority of Navajos, cannot function in the electoral process except in the Navajo or Keresan languages.

6. The Navajo and Keres populations of Cibola County live in circumstances of significant isolation from the non-Native American population of the county. Cibola County is unusually large in physical terms, and covers a geographic area roughly the size of the State of Connecticut. Over four-fifths of the non-Native American population lives clustered within or near the adjacent incorporated communities of Grants and Milan, close to the county courthouse. The Acoma and Laguna population centers are between 25 and 50 miles away from Grants, the county seat, while the Ramah Chapter House is approximately 50 miles from Grants. The isolation of the Native American population of Cibola County burdens their access to the franchise.

8. Native American citizens living within Cibola County, suffer from a history of discrimination touching their right to register, to vote, and otherwise to participate in the political process. Until 1948, Native American citizens of New Mexico were not permitted to vote in state and local elections. *Trujillo v. Garley*, C.A. No. 1350 (D.N.M., August 11, 1948). In 1984, the court in *Sanchez v. King*, C.A. No. 82-0067-M (D.N.M. 1984) held that the New Mexico state legislative redistricting plan discriminated against Native Americans.

9. The level of political participation by Native American citizens of Cibola County is depressed. Voter registration rates in the predominantly Native American precincts have been less than half the rate in non-Native American precincts, and Native Americans are affected disproportionately by voter purge procedures. Although Native Americans comprise over 38 percent of the county population, fewer than eight percent of all absentee ballots have been from the predominantly Native American precincts. There is a need for election information in the Navajo and Keresan languages, and a need for publicity concerning all phases of the election process for voters in Ramah, Acoma and Laguna. The rate of participation by Native Americans on such issues is less than one third of the participation rate among non-Native Americans. There is a need for polling places staffed with trained translators conveniently situated for the Native American population.

at pages 5-7.

The remedy for this unlawful disparity is complicated by the facts that (1) the Navajo and Pueblo languages are oral, not written, and (2) there are no equivalent terms in the Navajo and Pueblo languages for many words and phrases in the election process.

Native American polling place workers in reservation precincts faced a more difficult task than white poll workers in getting to the training session for poll workers that were held many miles away in county seats where most white people lived. At the training sessions Native American poll workers were given little or no instruction about how to translate ballots and propositions, and many of their attempts to do so on election day resulted in the most rudimentary references. For example, poll workers assisting voters at the polls would refer to the office of secretary of state as someone who works in

the state capitol, and bond levies for education were said simply to be increases in taxes. Many times the Native American poll workers found it so difficult to figure out how to explain items on the ballot they just instructed the voters to skip the offices or propositions. Moreover, Native American voters who had been purged from the voter rolls because they failed to respond to written notices they either did not receive¹³ or did not understand, were turned away from the polls with no explanation of why they were not able to vote, and were given no opportunity to re-register there.¹⁴

Pre-election investigation can pinpoint where federal observers should be assigned.

The task of assuring compliance by polling place workers with appropriate polling place procedures requires (1) knowledge of what is happening in the polling places, and (2) the authority to correct actions that are in violation of the prescribed procedures. For over 35 years DOJ has been determining, before each election, what will happen in specific polling places in particular counties in states far from Washington, D.C. Based on this information DOJ determined at which polling places discriminatory activity would take place, and the exact number of federal observers needed at each particular polling place, from among the hundreds of counties in the 16 states that are fully or partially covered under Section 4 of the Voting Rights Act,¹⁵ and the 10 additional jurisdictions in other states that have been and remain certified by courts under Section 3 of the Act.¹⁶

This DOJ effort, known as a pre-election survey, is conducted by the Voting Section of DOJ's Civil Rights Division. Pre-election surveys began right after the Voting Rights Act was enacted, as a tool for determining where and how many federal observers would need to be assigned under Section 8 of the Voting Rights Act. Through the years

¹³ Residences on the Navajo reservation often are miles apart, with no paved roads, and many homes have no telephones. It is not unusual for reservation residents to pick up their mail periodically at a store or other place far from their homes.

¹⁴ Voters were confused because they voted in tribal elections without problem, and were not told, for example, that under state law they had been purged from the county voter rolls because they did not vote with some particular frequency and in particular elections, such as every two or four years in general elections. To add to the confusion, in many areas the tribal elections and the state elections were held on different dates but at the same locations. Prior to the National Voter Registration Act, 42 U.S.C. § 1973gg et seq., voter registration in many counties in Indian country was conducted in the county seat, far from reservation housing, until, in some instances, litigation required that deputy registrars be made available at reservation sites, and that voter purge procedures be modified to allow fair notice to Native American voters. *United States v. State of Arizona*, CIV 88-1989 PHX EHC (D. Ariz., May 22, 1989), pgs. 6-11; First Amended Consent Decree, Jan. 3, 1994, pgs. 5-10.

¹⁵ Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina and Texas are fully covered under the Voting Rights Act's special provisions by the formula in Section 4 of the Act, 42 U.S.C. § 1973b. One or more counties are specially covered under Section 4 in California, Florida, Michigan, New Hampshire, New York, North Carolina, South Dakota and Virginia. All jurisdictions covered under Section 4 of the Act are listed in the Appendix to 28 CFR Part 55.

¹⁶ Certification under Section 3(a) of the Voting Rights Act, 42 U.S.C. § 1973b(a), is for a particular term as defined by the court. Certification by the U.S. Attorney General under Section 6 of the Voting Rights Act, 42 U.S.C. § 1973f, is for an unlimited time. Jurisdictions certified under Section 6 can seek to have their certification terminated under Section 13 of the Voting Rights Act, 42 U.S.C. § 1973k. Appendix D is a list of the jurisdictions that have been certified for examiners by court order under Section 3(a) of the Act.

the pre-election surveys have remained relatively unchanged for determining where racially discriminatory actions (as contrasted with language-based difficulties) would occur in the polling places of the Deep South. This process is instructive on a broad level because it can be used, with variations, by states throughout the country to determine, prior to election day, where problems will occur on election day in polling places across the state.

The DOJ focus during the pre-election surveys is to find circumstances that are likely to lead to actions that will disadvantage voters in the polls on election day. To allow black voters to vote without interference in the South, the Voting Section focuses on counties where black candidates are facing white candidates. Those are the circumstances where experience has shown that polling place workers are more apt to take actions that deprive African American of their right to vote. Moreover, the inclination of polling place workers to take discriminatory action against African American voters is more likely when the black candidates have a real chance of beating white opponents. (For concerns about other kinds of problems at the polls, the pre-election survey would focus on the facts and antipathies relating to those problems.)

The surveys consist of two rounds of telephone calls and a field investigation. The first round of phone calls begins about six weeks before the election, which is a time when candidate qualifying has been completed and campaigning has been in progress. The Voting Section contacts the election director in each county where the minority population is about 20% or more, since a relatively small but concentrated portion of a county's population can be a significant proportion of a single election district in a county. The Voting Section determines a number of facts from each county election official they contact, including the name and race of the candidates, the office each is contesting, which candidates are incumbents, the county's procedures for appointing polling place workers, and the county's procedures for responding to problems that arise on election day. The second round of telephone calls is made to at least two African American people in each county who are familiar with the way elections have been conducted in the county during recent elections, who know who the candidates are and how the candidates have been conducting their campaigns, and who are knowledgeable about relationships between the races in the county and whether there have been any recent racial incidents in the county.

Voting Section attorneys then travel to the counties where the facts from the two rounds of telephone calls indicate that the assignment of federal observers is needed because poll workers will make it difficult for black voters to cast their ballots for the candidates of their choice. The attorneys interview the county election officials, the county sheriff (or chief of police, if a city election is in issue), African American county residents, including people associated with community and civil rights organizations, and candidates. The attorneys relay their information and their recommendation as to whether federal observers should be assigned for the election, and, if so, number and placement of federal observers that will be needed on election day, to a Voting Section

supervisor who coordinates the survey.¹⁷ The polling places that are selected for the assignment of observers are (1) those at which the facts show that African American voters are likely to be victimized on election day, where (2) the county has no effective way to either know what is happening in the polls, or for responding to problems that occur at the polls, or both.

During the pre-election surveys the Voting Section supervising attorney talks frequently with the Voting Rights Coordinator at the Office of Personnel Management (OPM) who recruits and supervises the people who serve as observers.¹⁸ Thus, OPM is aware of the identity of the counties that are the subject of field investigations, and of the recommendations of the attorneys for the assignment, numbers and poll location of federal observers. Because of the ongoing coordination between the Voting Section and OPM, the federal observers are chosen and are ready to depart for their assigned location the moment a final decision is made by the Assistant Attorney General for Civil Rights as to the numbers and placement of the observers.¹⁹

Information from federal observers is obtained quickly and effectively on election day.

The pre-election process not only gives DOJ information it needs to determine where and how many federal observers will be needed on election day, it puts DOJ lawyers in contact with county election officials before the election, and the DOJ lawyers inform the county officials of the problems that DOJ has found out may occur in the county's polls on election day. This contact continues during the election, as the DOJ lawyers provide the county election officials with information the lawyers get from the observers.

¹⁷ The Voting Section is headed by a chief and four deputy chiefs. There also are special counsels who are senior attorneys assigned to perform particular duties. The pre-election work for a particular jurisdiction is overseen by a deputy chief if the jurisdiction is a defendant in recent litigation. Otherwise, the pre-election supervision is handled by the special litigation counsel for elections.

¹⁸ Federal observers are assigned and supervised by the Office of Personnel Management. See 42 U.S.C. § 1973f. OPM centralized the observer program in the OPM office in Atlanta, Georgia, over the past several years. Beginning in 2002 the program will be centralized in the OPM office in Denver, Colorado.

There is no standing group of people who are federal observers. Rather, the people chosen to serve as federal observers at a particular election are volunteers, usually from among the OPM nationwide staff except when special abilities are required, such as Native American language ability. General training sessions are held for observers and observer supervisors at selected sites during the year. Often people will volunteer to serve as observers in election after election, but they are not always available because of the demands of their regular work assignments and prior obligations. Because of the need to recruit observers for each election, and the logistical requirements of transportation (airplane tickets, rental car) and lodging, the OPM coordinator and the Voting Section supervising attorney are in contact throughout the year to discuss observer needs in upcoming elections.

¹⁹ If a county for which federal observers is recommended has not been certified yet for federal examiners, a separate recommendation for certification of the county is made to the U.S. Attorney General, and a certification form is prepared for the U.S. Attorney General's signature. Also, because certifications are effective upon publication in the Federal Register, 42 U.S.C. § 1973b(b), arrangements are made for publication as soon as possible after the U.S. Attorney General signs the certification. Similar arrangements are made by OPM which must publish in the Federal Register a location for an examiner's office. 42 U.S.C. § 1973e(a).

The observers are briefed by DOJ attorneys and the observer captain on the day before the election. The observers get to their assigned polling place one-half hour before the poll opens, and usually will remain until the last person leaves the poll. They have pre-printed forms on which to record the activity in the polls. Observers usually also attend the ballot count and record the number of votes received by each candidate.

During election day an observer supervisor makes repeated visits to the polling places where federal observers are stationed, and remains in constant telephone contact with the DOJ attorney who is in the county. This gives the DOJ attorney in the county a constant flow of information throughout the day about activities that transpire inside the polls.²⁰ When the federal observers inform the DOJ attorney of actions of polling place officials that the attorney concludes are interfering with the voting rights of African Americans, the DOJ attorney gives the facts to the local official in charge of the election, which allows him or her to stop the discriminatory activity. Local officials also can use this information after the election to take steps to prevent the incidents from happening again.

Similar steps are taken on election day when federal observers are used to determine compliance with the language minority provisions of the Voting Rights Act, but normally the pre-election preparation is different. The inability or lack of desire of poll workers to provide information to non-English speaking voters usually does not depend on the identity of the candidates or the issues involved in a particular election. Thus, the information obtained in one election will allow a determination of whether federal observers will be needed in the next election.²¹

The reports of these federal observers have their primary emphasis on the language aspects of polling place procedures and the actions of polling place workers. (The federal observers assigned to a particular polling place speak the minority language that is used by the voters at that polling place.) It usually is not important that the observers arrive at the opening of the polls, nor that they stay all day, since the goal is to have the observers attend the polls for a sufficient length of time to witness a number of minority language voters go through the voting process. This will give the observers sufficient facts to allow the DOJ attorneys to analyze the county's compliance with the law.

We should emphasize that the federal observers do not interfere with the election process. Their limited function, to pass along information to their OPM supervisors and

²⁰ In addition, the DOJ attorney in each county calls the supervising attorney often during the day: when the polls open, and every hour after that until it is clear that correct procedures are being followed at the polls in that county, unless continuing problems and their resolution make it necessary to continue frequent contact. This coordination between the supervising attorney and the attorney in the field begins on the day before the election, and does not end until the attorney leaves the county to return to Washington, D.C., on the day after the election or later.

²¹ Initial facts indicating possible violations of the Voting Rights Act most often come to DOJ through complaints by telephone, by mail, or in conversation with DOJ attorneys, paralegals and analysts in the performance of their routine duties.

the DOJ attorneys, is in accord with the dictates of Section 8 of the Voting Rights Act, 42 U.S.C. § 1973f. The observers must not give instructions to poll workers, must not give help to voters, and must not share their observations, judgments or opinions with individuals in the polls. They are eyes and ears. They are paid witnesses.²²

The federal observers' reports allow Justice Department attorneys to require counties to comply with their states' rules.

In its enforcement of all federal civil rights laws the Department of Justice (DOJ) attempts to obtain voluntary compliance from prospective defendants. This has been especially true of the enforcement of the Voting Rights Act where the prospective defendants are officials of state and local governments.

From the beginning of DOJ's enforcement of the Voting Rights Act DOJ lawyers personally conducted investigations in each county before examiners or observers were assigned, regularly checked on the progress of examiners while voter registration was conducted, and on election day a DOJ attorney was and continues to be present in each county to which federal observers are assigned to obtain information from the observers during election day, and debrief the observers immediately after the election. During their presence in the counties the DOJ lawyers have continuing contact with county officials, and give them the information the lawyers gain as part of their pre-election investigation in the county, and from the federal observers. Those local officials, faced with the immediate and continuing presence of DOJ lawyers, usually instruct the head worker at the polling place to follow the appropriate procedures.

The federal observers inside the polling place witness the cessation of the discriminatory action, or if the discriminatory action continues, the DOJ lawyer again brings the information from the observers to the attention of the county election official to get further corrective action. Thus, federal observers function both to gather evidence of discriminatory activities in the polling place for future legal action, and for the elimination of discriminatory actions on the spot. At times, the mere presence of federal observers at the polls serves to inhibit the tendency of many polling place workers to take discriminatory action against African American voters.

Court-ordered remedies require counties to do their job in the South.

Some compulsive action is needed when county election administrators do not address outstanding problems in the polls, and do not follow proper election day procedures. A primary reason for the mistreatment of African American voters was and

²² It is of utmost importance that observers stick to their role at the polls, because they are able to be in the polling places only by the authority of Section 8 of the Voting Rights Act. 42 U.S.C. § 1973f. States have laws about who can enter the polls. Usually those individuals include poll workers, voters, voters' assistants, peace officers when called, and candidates' or political parties' poll watchers. Others will be inside the polls in violation of law unless specifically authorized to be there by the appropriate local election official. Moreover, under Section 8 of the Voting Rights Act the federal observers are able to be in the polls only to perform the tasks noted above.

continues to be the failure of local election officials to appoint African Americans as polling place workers. The evidence of mistreatment that this discriminatory policy had on African American voters has provided a firm basis for court orders that required the defendants to take specific steps to recruit and hire African Americans to work in the polls. One good example of this result is the consent decree in *United States v. Conecuh County, Alabama*, supra, which required the defendant political party executive committees (responsible for nominating people to serve as poll workers) to “engage in affirmative recruitment efforts aimed at ensuring that the pool of persons from which nominations are made fully reflects the availability of all qualified persons in Conecuh County who are interested in serving as election officials, without regard to their race or color.” at pp. 3-4.

Those recruitment efforts were required to include encouraging candidates to “seek out and propose for nomination black citizens,” and “sending notices to local organizations comprised predominantly of black citizens...to advise them that the party intends to nominate persons to serve as election officials and encourage them to have interested persons notify the chairperson of the respective political party executive committee of their willingness to serve as election officials,” at p. 4.

A 1993 consent order in *United States v. Johnson County, Georgia*, CV393-45 (S.D. Ga, Sept 14, 1993) stated that,

1. According to the 1990 Census, the total population in Johnson County is 34 percent black and the total voting age population is 29.2 percent black.

* * * * *

7. Of the one hundred thirty one individuals who were employed by Johnson County to serve as poll officials between 1988 and August 1992, eighteen (14%) were black. There were no black poll workers during this period at seven of the twelve polling places.

8. Only eight (12%) of the Sixty-six poll officials employed by Johnson County for the July 21, 1992 primary election were black. There were no black poll workers at eight of the twelve polling places.

9. Of the one hundred and six poll officials employed by Johnson County for the November 3, 1992 general election, only sixteen (15%) were black. There were no black poll workers at six of the twelve polling places.

10. No black person has ever served as a managing poll officer or an assistant managing poll officer at any of the county's polling places.

At pages 2-3.

Included in the *Johnson County* consent decree among the steps the defendant county commission and supervisor of election must take to have African Americans fairly represented among the polling place workers are, “sending written notices to local organizations comprised predominantly of black citizens ...to advise them that the county

intends to appoint black persons to serve as poll workers and poll managers;” and “contacting black candidates and members of the political parties...to ascertain the names, addresses and telephone numbers of black citizens who are qualified and available to serve as poll officers.” *Id.* at 6. In addition, the defendants must publicize in local newspapers, on radio, on television and on posters their policy of conducting elections free of racial discrimination. They also must train the poll workers on how to perform their duties in a racially nondiscriminatory manner, and, with specificity, on how to deal with voters who need assistance.

Even with the specific steps set out in the 15 page *Johnson County* consent decree, the reports of federal observers showed that African American citizens of the Johnson County were continuing to be excluded from among the ranks of those appointed to work at the polls because the supervisor of elections did not adhere to the terms of the decree. After further discussions between the county and DOJ, in lieu of DOJ pursuing contempt of court proceedings the county appointed a biracial committee formed of county residents to perform the preliminary poll worker recruitment and nomination functions previously performed by the election supervisor, leaving her with her statutory duty of formally appointing the poll workers. (This change in practice was reviewed and precleared under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c.) As a result, African Americans were fairly appointed among those who worked at the polls, and discrimination against African American voters at the polls abated in Johnson County, Georgia.

Both the *Conecuh County* and *Johnson County* cases show how information gathered by observers can serve as the evidentiary basis for litigation, how particular individuals at the county level can persist in discriminatory procedures in spite of state law and federal litigation, and how the identity and training of the people working inside the polling places is of primary importance in eliminating injustice from the polls. It should be remembered that in both instances the DOJ lawyers first shared their information with state and local election officials in an attempt to allow those officials to eliminate the discriminatory treatment of voters. These efforts provided the election officials with something they could obtain by themselves, but did not: information about what went wrong in their polls. The need for the resulting litigation demonstrated that those officials were not willing to stop the discriminatory conduct.

Court-ordered remedies require counties to do their jobs for language minorities.

Even after the Voting Rights Act was amended in 1975 to require that areas designated under a formula must provide information and ballots in languages other than English, inadequate training of polling place workers continued to disadvantage minority language voters. The reports of federal observers gave the attorneys from the Department of Justice the information they needed to prove to county officials that violations of the Voting Rights Act had occurred, and to obtain consent decrees that set out specific steps that the counties would take to effectively provide and translate election information to Native American citizens.

Most of the consent decrees to cure discriminatory actions in Indian country under the language minority provisions of Section 203 of the Voting Rights Act, 42 U.S.C. § 1973aa-1a, were lengthy and set out in detail the procedures that election officials had to follow for voter education, voter registration, translation and balloting.²³ It is significant that the great majority of the provisions in the consent decrees focused on the counties' administrative responsibilities, including hiring additional county personnel, to try to give Native American voters equivalent access to information about an election and voting procedures as white people got as a matter of course, since all information was provided in English and in areas near the county seats.

Thus, the Stipulation and Order in *United States v. Cibola County, New Mexico*, No. Civ 93 1134 LH/LFG, (D.N.M., Apr. 21, 1994)(three-judge court), is 44 pages long, 33 pages of which is a Native American Election Information Program. This program provides that, "Cibola County shall employ at least three Native American Voting Rights Coordinators who will coordinate the Native American Election Information Program in Cibola County..." These coordinators have to be bilingual in either Navajo or Keres and English, they are to be hired only after the county consults with the tribes, they are to be trained in all aspects of the election process, they are to attend and make presentations at chapter and tribal council meetings, and perform numerous, specifically described functions that would provide election information to the Native American citizens of Cibola County.

It was and remains difficult, however, to compel obdurate county clerks and other county election administrators to perform the myriad election-connected functions in a way that meets the requirements of the court orders.²⁴ These cases argue persuasively for continuing the practice of seeking lengthy, detailed court orders that can be enforced through contempt proceedings.

²³ For example, the Consent Agreement is 36 pages long in *United States v. Socorro County, New Mexico*, Civil Action No. 93-1244-JP (D.N.M. Apr. 13, 1994) (three-judge court); in *United States v. State of New Mexico and Sandoval County, New Mexico*, Civil Action 88-1457-SC (D.N.M. Mar. 28, 1990) (three-judge court), is 12 pages long, and the accompanying Native American Election Information Program filed on April 30, 1990, is 24 pages long; the First Amended Settlement and Order in *United States v. San Juan County, Utah*, Civil Action No. C-83-1287 (D. Utah, Aug. 24, 1990) (three-judge court), is 21 pages; the First Amended Consent Decree and Order in *United States v. McKinley County, New Mexico*, Civil Action No. 86-0028-M (D.N.M., Jul. 20, 1990) (three-judge court), is 23 pages; and the Consent Decree in *United States v. State of Arizona*, CIV 88-1989 PHX EHC (D. Ariz, May 22, 1989), affecting Apache and Navajo Counties, is 24 pages, while the First Amended Consent Decree in that case (Jan. 3, 1994) is 28 pages long.

²⁴ A letter of understanding was developed between DOJ and San Juan County, New Mexico, which required the county to adopt a manual of procedures to comply with the language minority requirements of the Voting Rights Act. The manual would become final after review and concurrence by DOJ. Changes in the procedures would become effective upon the concurrence of DOJ. Letters of understanding have not been widely used by DOJ in its Voting Rights Act enforcement. The letters have the advantage of getting a fast remedy and avoiding the uncertainties of litigation. The main disadvantage of using a letter of understanding is the inability to seek contempt of court sanctions if the county does not follow the steps in the letter or the county's manual of procedures. If the actions that the county fails to take are significant, a legal action would need to be filed at that time, prolonging the time for obtaining a remedy.

An alternative approach was taken in a consent decree between DOJ and Bernalillo County, New Mexico, where the court order was accompanied by a manual of procedures to comply with the language minority requirements of the Voting Rights Act. *United States v. Bernalillo County, New Mexico*, CV-98-156 BB/LCS (D.N.M. Apr 27, 1998). The consent decree required that the county hire a native language coordinator who is bilingual in Navajo and English, and specifically noted that, "The primary responsibility of the [native language coordinator], a full-time employee of Bernalillo County, shall be to carry out the county's Navajo language election procedures, publicity and assistance, including assisting the county to carry out the procedures in the manual..." at p. 4. The consent decree also required the county to establish a travel, supply, and telephone call budget for the native language coordinator, and subjected the county to the preclearance provision in Section 3(c) of the Voting Rights Act, 42 U.S.C. § 1973a(c), which allows the county to make changes in the manual and for DOJ to review those changes to determine that they are nondiscriminatory before they can be implemented. This approach has the benefit of allowing the county to tailor its administrative procedures to its particular personnel and office situation, and of allowing practical changes to be made in the administrative procedures when necessary without having to request the three-judge court for an amendment to the court order.

Conclusion.

The federal observer provision of the Voting Rights Act continues to be extraordinarily effective in allowing the United States Department of Justice to enforce the Voting Rights Act. That provision should be extended.

The federal examiner provisions of the Voting Rights Act have accomplished their goal of allowing African American voter access to the voter rolls in areas where official resistance kept them from becoming registered voters. Those provisions have done their job and should be eliminated, especially insofar as they are prerequisites for the assignment of federal observers.

The federal observer provision of the Voting Rights Act performs an effective law enforcement function as it is written and applied. That provision should not be altered.

APPENDIX A

NUMBER OF PERSONS LISTED BY FEDERAL EXAMINERS
UNDER SECTION 7 OF THE VOTING RIGHTS ACT, 42 U.S.C. 1973e
1965 - 2000²⁵

<u>State</u>	<u>Total People Listed</u>	<u>Non-white People Listed</u>	<u>White People Listed</u>
Alabama ²⁶	66,539	61,239	5,300
Georgia ²⁷	3,557	3,541	16
Louisiana ²⁸	26,978	25,136	1,842
Mississippi ²⁹	70,448	67,685	2,763
South Carolina ³⁰	<u>4,654</u>	<u>4,638</u>	<u>16</u>
Total	172,176	162,239	9,937

²⁵ This information is extracted from the Semiannual Report of Cumulative Totals on Voting Rights Examining as of December 31, 2000, Prepared by the Office of Workforce Information, Office of Merit Systems Oversight and Effectiveness, U.S. Office of Personnel Management, Washington, D.C. 20415.

²⁶ People were listed in Autauga, Dallas, Elmore, Greene, Hale, Jefferson, Lowndes, Marengo, Montgomery, Perry, Sumter and Wilcox Counties.

²⁷ People were listed in Butts, Lee, Screven and Terrell Counties.

²⁸ People were listed in Bossier, Caddo, DeSoto, East Carroll, East Feliciana, Madison, Ouachita, Plaquemines and West Feliciana Parishes.

²⁹ People were listed in Amite, Benton, Bolivar, Carroll, Claiborne, Clay, Coahoma, DeSoto, Forrest, Franklin, Grenada, Hinds, Holmes, Humphreys, Issaquena, Jasper, Jefferson, Jefferson Davis, Jones, LeFlore, Madison, Marshall, Neshoba, Newton, Noxubee, Oktibbeha, Pearl River, Quitman, Rankin, Sharkey, Simpson, Sunflower, Tallahatchie, Walthall, Warren, Wilkenson, and Winston Counties.

³⁰ People were listed in Clarendon and Dorchester Counties.

APPENDIX B

ASSIGNMENT OF FEDERAL OBSERVERS
 UNDER SECTION 8 OF THE VOTING RIGHTS ACT, 42 U.S.C. 1973f
 BY YEAR AND STATE, 1966 - 2000³¹

Year	AL	GA	LA	MS	NC	SC	AZ	CA	IL	MI	NJ	NM	NV	NY	TX	UT	WI	TOTAL
1966	823	22	397	470		158												1,870
1967			215	1,108														1,323
1968	252	138	125	507		152												1,174
1969	44		20	325														389
1970	403	6	16	126		19												570
1971			54	960														1,014
1972	140	44	60	146		105												495
1973																		0
1974	234	64	56	100														454
1975		11	116	1,252														1,379
1976	181	67	33	132											193			606
1977				89														89
1978	598	4		31		67		146					3		90		6	945
1979			130	1,212				140										1,482
1980	272	156	12	274											19			733
1981				72														72
1982	973	58	23	37														1,091
1983	187		3	1,288														1,478
1984	260	137		439	70	158									10			1,074
1985		19		152		7								107				285

³¹ This information is extracted from the summary of federal observer activity by calendar year, United States Department of Justice, Civil Rights Division, Voting Section. Southern states are listed first in this chart because federal observers were assigned only to Southern states for the first years shown.

Year	AL	GA	LA	MS	NC	SC	AZ	CA	IL	MI	NJ	NM	NV	NY	TX	UT	WI	
1986	149	15		155			40					65						424
1987	51			490								12			15			568
1988	127	65		124	39	45	150					89			31	23		693
1989	13			13								22		132				180
1990	61	72			36	67	145					72				25		478
1991		12		345		40	3					38		19				457
1992	53	151		23			181					87		17	5	13		530
1993	11	84		124		20	25					36		230				530
1994	95	18	11	35	45		109					147		55		18		533
1995			19	104								29						152
1996	39	76		121		72	108	39				89		36	24	17		621
1997	5			174				7				5		28				219
1998	29	6					109	20				129		12		19		324
1999		5	56	342							50	6						459
2000	44	42	8	24			105	23		68	128	140		23	16	19		640
TOTAL	5,044	1,272	1,354	10,794	190	2,046	975	375	0	68	178	966	3	659	403	134	6	23,331

APPENDIX C

EXCERPTS FROM PLAINTIFF'S RESPONSE TO INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS, *United States v. Conecuh County, Alabama*, Civil Action No. 83-1201-H (S.D. Ala., Jun 12, 1984).

A white voter waiting in line to vote stated to white poll official John P. Bewley that she was unable to obtain a yellow sample ballot distributed by the Alabama Democratic Conference. The black voter standing next in line had such a ballot. Mr. Bewley stated, "You ain't [sic] of the right color." During the same day, Mr. Bewley stated to federal observer Riddle, "See, the niggers bring in these yellow marked ballots. The nigger preachers run the niggers down here, you know. They tell them how to vote. I don't think that's right."

P. 7.

Poll officials instructed white registered voters to confirm their registration status in the office of the Probate Judge. Black voters whose names were not on the list were in each instance simply told that they could not vote, and were given no instruction by poll officials. White voter Salter's name did not appear on the list, and Ms. Salter acknowledged that she resided in a rural precinct and not in box 11-1. Ms. Salter nevertheless was allowed to vote an unchallenged ballot directly on the machine.

Pp. 8-9.

Ms. Lewis, who required assistance because of a vision problem, signed the poll list and stated that she wished for her companion (unidentified) to provide assistance in voting for her. White poll official Windham stated, "Can't nobody go in there with you." After a pause, Mr. Windham stated to Ms. Lewis, "you can fill out an affidavit and then she can go in with you. Can't you [read]?" Mr. Windham's tone and manner were sufficiently abrasive that Ms. Lewis left the voting place. Some moments later she was observed to remark to a companion, who was trying to persuade her to make another attempt to vote, "I've done had trouble with them twice before and I'm not begging them any more. I'm not scared but I'm not begging anybody." Ms. Lewis returned accompanied by Mr. Richard Rabb, at that time the Chair of the Conecuh county Branch of the Alabama Democratic Conference. Ms. Lewis was allowed to vote, and the poll officials provided necessary assistance with the affidavit. Ms. Lewis remind very upset and remarked, "Why couldn't they have let me vote to begin with?"

Pp. 16-17.

Black voters at box 9-1 (Old Town) were told throughout the day of the October 12, 1982 special run-off election, that no more than two voters were allowed in

the polling place at one time. This restriction was imposed on 30-35 occasions. In no instance were white voters required to conform to this procedure, and the poll officials allowed as many as five white voters in the polling place at a time.

P. 21.

Ms. Stacey enforced the limitation on the amount of time a voter could spend in the booth in a random and discriminatory fashion. She enforced the limitation against black voters more frequently than against white voters. During the last hour of voting the requirement was applied exclusively against black persons. On at least two occasions she told black voters that their time had elapsed when, in fact, it had not.

P. 24

During the course of the day, poll officials addressed all black voters by their first names. Older white voters were addressed by the courtesy titles of Mr. and Ms.

P. 35

White poll official James Ellis initiated new procedures for assistance of black voters. Without notice to any person, Mr. Ellis required assistants accompanying voters into the polling place to remain 30 feet outside the polls until Mr. Ellis had finished interviewing the voter and summoned the assistant.

Pp. 36-37.

Poll officials who assisted black voters did not read the ballot to the voters or otherwise advise the voters of the contests and the candidates. They simply asked the voters, "Who do you want to vote for?"

* * * * *

Poll official Lois Stacey marked the ballot for a voter she was assisting in contests in which the voter did not express a preference.

* * * * *

Poll officials frequently served as assistants without asking voters receiving assistance who they wanted to assist them. On a number of occasions, poll officials serving as assistants did not read the complete ballot to the voters.

P.40

APPENDIX D

JURISDICTIONS CERTIFIED FOR FEDERAL EXAMINERS
UNDER SECTION 3(A) OF THE VOTING RIGHTS ACT AS OF 2000³²

<u>State</u>	<u>Jurisdiction</u>	<u>Term of certification</u>
Illinois	Town of Cicero	October 23, 2000 order, effective until December 31, 2005
Louisiana	St. Landry Parish	December 5, 1979 order, effective until further order of the court
Michigan	City of Hamtramck	August 7, 2000 order, effective until December 31, 2003
New Jersey	Passaic County	June 2, 1999 order, effective until December 31, 2003
New Mexico	Bernalillo County	April 27, 1998 order, effective until June 30, 2003
	Cibola County	April 21, 1994 order, effective until April 21, 2004 (originally certified by December 17, 1984 order)
	Sandoval County	September 9, 1994 order, effective until at least September 9, 2004 (originally certified by December 17, 1984 order)
	Socorro County	April 11, 1994 order, effective until April 11, 2004
Utah	San Juan County	December 31, 1998 order, effective until December 31, 2002 (originally certified by January 11, 1984 order)

³² Information obtained from *Jurisdictions Currently Eligible for Federal Observers as a Result of Orders Under Section 3(a) of the Voting Rights Act*, United States Department of Justice, Civil Rights Division, Voting Section, October 22, 2001.

POLITICAL OBSERVER PROTOCOL

Apache
County



If you have further questions,
please contact (800) 361-
4402 or (928) 337-7537. We
would be happy to assist you
in any way.

You may also access this
information by logging on to our
Website at: www.co.apache.az.us

Any person violating any provision of this notice is guilty of a class 2 misdemeanor.

Protocol Guidelines:

Apache County Elections are conducted pursuant to the guidelines set forth under the Federal Voting Rights Act of 1965.

Political Observer Protocol: A.R.S. § 16-590

Statute allows for a political observer and an alternate to be appointed by the County Chairman of each party that has a candidate on the ballot for each polling place in the County.

The Apache County Elections Department in their efforts to carry out this law, feel the importance of establishing polling place protocol for Voters, Election Board Workers and Observers.

This will insure that questions or issues, no matter where or when they may occur during Election Day, are handled as quickly and efficiently as possible with minimal disruption to the voter and to the Election Board.

Political Appointment

If you have been appointed as a Political Observer you must have in hand your signed appointment when entering the Polling Place to show to the Inspector, Marshal or other member of the Election Board.

Questions or Concerns

If you have questions or concerns, please use the following procedure. If you are observing in a Reservation Precinct, your first point of contact needs to be the "Troubleshooter" for that precinct.

The Troubleshooter

This person has been appointed by the Elections Department to oversee all processes in that precinct.

The Troubleshooter has been instructed to contact our office with your concern(s).

Contact Us Direct

If for some reason, you are unable to contact that person, please call the Elections Department directly at 1(800)361-4402 or (928)337-7537 and ask for Margaret A. Coalter, Recorder or Penny L. Pew, Elections Director. We would ask that you not contact the Precinct Inspector.

Polling Place Etiquette

A number of polling places will be very crowded, therefore we ask that you conduct your observing as quietly as possible. You may not enter a voting booth, unless it is your precinct and you are entering the voting booth to mark your ballot.

Please Don't Touch the Ballots

While you are allowed by law to observe many processes or areas where ballots are being handled, you are not allowed to touch any ballot(s) or voting equipment.

"no person shall be allowed to remain inside these limits while the polls are open, except for the purpose of voting; and except the election officials [and] representatives who have been appointed by the county chairman, and the challengers allowed by law." [A.R.S. §§ 16-515.01 to 16-515.03, 16-1018.01]

